Supreme Court, U. S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1974

## No. 74-1023

HENRY W. KERR, et al., *Petitioners*,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent*,

JOHN VAN GELDERN, et al., *Real Parties in Interest*.

**PETITION FOR WRITS OF CERTIORARI**
**to the United States Court of Appeals for the Ninth Circuit**
~~**and to the United States District Court for the Northern District of California**~~

~~**AND**~~

~~**MOTION FOR LEAVE TO FILE**~~

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No.

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UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

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## MOTION FOR LEAVE TO FILE PETITION FOR WRITS OF CERTIORARI

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Petitioners respectfully move this Court for leave to file the annexed petition for writs of certiorari under Title 28 United States Code Section 1651, directed to the United States District Court for the Northern District of California, to review orders of that court entered on June 20, 1974 and on December 3, 1974, and more particularly described in the petition, and for such other and further relief as may be just and proper.

This motion is made in conjunction with a petition for writs of certiorari under Title 28, United States

Code section 1254(1), to review orders of the United States Court of Appeals for the Ninth Circuit, entered on December 18, 1974, and January 17, 1975, in the same proceedings.

Dated, February 14, 1975.

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*Attorneys for Petitioners.*

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HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*
JOHN VAN GELDERN, et al., *Real Parties in Interest.*

---

## PETITION FOR WRITS OF CERTIORARI
## to the United States Court of Appeals for the Ninth Circuit and to the United States District Court for the Northern District of California

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Petitioners, Henry W. Kerr, et al.,[1] respectfully pray that writs of certiorari issue to review the decisions of the United States Court of Appeals for the

[1]Petitioners are the defendants below named in the complaint as follows: "Henry W. Kerr, Curtis O. Lynum, Manley J. Bowler, Leland M. Edman, James H. Hoover, Charles E. Brown, Daniel R. Lopez, individually and in their official capacity as members of the California Adult Authority, Joseph A. Spangler, individually and in his official capacity as Administrative Officer of the California Adult Authority, Raymond K. Procunier, individually and in his official capacity as Director of Corrections of the State of California, their agents, employees and successors in interest, Defendants."

Ninth Circuit denying petitioners' petitions for writs of mandamus, entered on December 18, 1974 and on January 17, 1975, and to review the underlying orders of the United States District Court for the Northern District of California, entered on June 20, 1974 and on December 3, 1974, which gave rise to the mandamus proceedings. By reason of these orders, petitioners must produce for adversary inspection the confidential contents of the personnel files of members and hearing representatives of the California Adult Authority (the state parole board), and of the correctional files of any 200 California state prisoners designated by plaintiffs, and specified other categories of confidential state government documents.

The two district court orders were entered by the same judge in the same action, and both compel the discovery of confidential state government documents. The two Court of Appeals decisions were rendered on petitioners' attempts to obtain interlocutory review of the discovery orders. Pursuant to Rule 23(5), Supreme Court Rules, this single petition for writs of certiorari is submitted to seek review of the two decisions of the Court of Appeals and of the two discovery orders of the district court.

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## OPINIONS BELOW

The opinion of the Court of Appeals dated January 17, 1975 has not yet been reported. A copy of this opinion is annexed as Exhibit A of the Appendix to this petition. The underlying discovery order of the



district court, dated June 20, 1974, as well as the magistrate's findings and recommendations, dated April 24, 1974, which are incorporated by reference in the district court's order, are annexed as Exhibit B of the Appendix to this petition.

The order of the Court of Appeals dated December 18, 1974, has not been reported. A copy of this order is annexed as Exhibit C of the Appendix. A copy of the underlying discovery order of the district court, dated December 3, 1974, is annexed in Exhibit D of the Appendix to this petition. This order incorporates an earlier discovery order, dated August 12, 1974, and magistrate's findings and recommendations dated June 11, 1974. Both of these documents are also annexed in Exhibit D of the Appendix to this petition.

---

## JURISDICTION TO REVIEW

The decisions of the Court of Appeals sought to be reviewed were entered December 18, 1974, (No. 74-3392) and on January 17, 1975 (No. 74-2206) and each denied petitioners' petitions for writ of mandamus and/or prohibition to review discovery orders entered by the district court in the same action on December 3, 1974 and on June 20, 1974. This Court's jurisdiction to review these decisions of the Court of Appeals is invoked under Title 28 United States Code section 1254(1).

The underlying discovery orders of the district court sought to be reviewed were entered on December 3, 1974, and on June 20, 1974. The jurisdiction of this

Court to review directly these orders of the district court is invoked under Title 28 United States Code section 1651.

The special and unusual circumstances which warrant exercise by this Court of its discretionary power to issue the common law writs of certiorari, as requested in this petition, as well as reasons why the relief is not available in any other court, are set forth later under the heading "Reasons For Granting The Writs."

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## QUESTIONS PRESENTED

1. Whether Rule 26(b) (1), Federal Rules of Civil Procedure, extends to confidential state government documents a qualified privilege of non-disclosure whereby their production for adversary inspection may be compelled only after the district court has looked at them and decided their utility in the pending action outweighs their confidentiality.

2. Whether such a qualified privilege may be asserted by the attorney general on behalf of his client who is a defendant and head of the department which controls the state government documents where (a) the confidential nature of the documents is apparent; (b) the utility of the documents in the pending action is not apparent, and (c) there is an abundance of alternative sources of information adequate to pursue the points for which the confidential documents are sought.

3. Whether the compelled disclosure of confidential government documents for adversary inspection under



the protective orders in this case, or under any protective order, is a permissible substitute for a qualified privilege of non-disclosure under Rule 26(b) (1) Federal Rules of Civil Procedure.

4. According to what standard should the Court of Appeals exercise discretion under Title 28 United States Code section 1651 to review interlocutory discovery orders?

5. Whether the completed production of a confidential document for adversary inspection under a court order not supported by a showing and objective determination that there is probable cause to believe the utility of the document in a pending action outweighs its confidentiality is an unreasonable search or seizure in violation of the Fourth Amendment to the United States Constitution.

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## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Federal Rules of Civil Procedure, Rule 26(b)(1):

> "Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things

and the identity and location of persons having knowledge of any discoverable manner. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

United States Code, Title 28 section 1651(a):

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

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## STATEMENT OF THE CASE

### A. Nature of the Action Below.

This is a civil rights class action on behalf of all adult male felons in prison or on parole, for declaratory and mandatory injunctive relief to determine what process is due at state parole and disciplinary proceedings.[2]

[2]The complaint asserts that due process requires the following rights be furnished at all proceedings on considering, rescinding, or revoking parole; at term fixing or re-fixing proceedings, and at serious disciplinary proceedings: (1) the right to counsel, appointed if necessary; (2) the right to present favorable witnesses; (3) the right to confront and cross-examine adverse witnesses; (4) the right to discovery of evidence which may be considered at the hearings; (5) the right to challenge panel members for bias; (6) the right to a verbatim record of the proceeding; (7) the right to a written decision including a statement of the reasons for decision and of the evidence relied on.

The requirements of due process at parole revocation and disciplinary proceedings have already been established by this Court. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Wolff v. McDonald*, ___ U.S. ___, 94 Sup. Ct. Rptr. 2963, 41 L. Ed. 2d 935 (1974). At parole rescission hearings, California state prisoners are entitled to the due process standards set forth in *Morrisey. In re Prewitt*, 8 Cal. 3d 470, 503 P. 2d 1326 (1972). Whether the right to counsel under *Scarpelli* also applies to California parole rescission proceedings has been briefed, argued, and submitted to the California Supreme Court in *Gee v. Brown*, No. SAC. 7994.

For parole consideration proceedings, a California state prisoner has the right to notice, to examine the contents of his correctional file, to appear and be heard, and to written reasons for any denial of parole. *In re Olson*, 37 Cal.App.3d 783, 12 Cal.Rptr. 579 (1974); *In re Sturm*, 11 Cal.3d 258, 521 P.2d 97 (1974). Term-fixing generally attends parole consideration proceedings, and term-refixing generally attends parole revocation proceedings.

From the above, it would appear that the only "open" questions in the action concern plaintiffs' demands for rights to counsel and to call and confront witnesses at parole consideration proceedings, and their demands for rights to challenge for bias and to a verbatim record at all the indicated proceedings. The resolution of these questions of law would neither require nor justify the compelled indiscriminate production of the confidential documents sought by plaintiffs.



Despite the breadth of allegations in the complaint, the action has focused on parole consideration proceedings, and counsel for plaintiffs have focused their discovery on such proceedings.

The complaint was filed on November 15, 1972. No monetary relief is demanded by plaintiffs, and respective counsel have agreed that this is a non-jury case and that no jury has been demanded.

The commencement of trial is presently calendared for June 9, 1975.

**B. Proceedings Relating to the Discovery Orders Sought to be Reviewed.**

1. *The contents of immate files* (U.S.D.C. Order of December 3, 1974; Court of Appeals Order denying mandamus in action 74-3392 on December 18, 1974).

Pursuant to Rule 34, Federal Rules of Civil Procedure, plaintiffs requested that defendants produce the correctional files of every twentieth inmate (over 1000 files). Upon defendants' objection (on grounds of confidentiality, and Fourth Amendment grounds) and plaintiffs' motion to compel, the magistrate recommended that the files of up to 200 inmates be produced under a protective order limiting inspection to plaintiffs' counsel, and use only in connection with this case. (Appendix, Exhibit D). By order dated August 12, 1974, the district court affirmed the magistrate with an addition to the protective order to require that inmates consent to inspection of their files.

In September 1974, defendants produced the correctional files of the inmates first designated by plaintiffs (22 inmates). In doing so, however, certain confidential documents were withheld from the files as a preliminary matter. These documents included reports from confidential informers, crime partner information, sensitive clinical data, investigative reports accompanying certain visitor requests, and confidential communications from judges and district attorneys. Each document withheld was identified in writing as was the reason for withholding it, and plaintiffs' counsel was furnished the writing.



The inmate files furnished were inspected by counsel for plaintiffs on October 9, 11, and 15, 1974. By letter dated October 15, 1974, counsel for defendants advised counsel for plaintiffs that if they wished to inspect any of the confidential documents withheld, they should express some specific need for them in the pending action, whereupon the confidentiality of the documents would be re-evaluated in the light of such need. This letter sought negotiations between counsel and then, if necessary, presentation of the documents to the district court for an *in-camera* inspection and balancing of the interests in confidentiality against plaintiffs' need for the documents in the action.

Plaintiffs rejected this suggestion and filed on October 19, 1974, a motion for "Enforcement, Clarification, and Sanctions," which asserted that defendants violated the district court's order by not furnishing the confidential documents, and requested an order that the inmate files be furnished intact, that plaintiffs be allowed to make photocopies of any and all of the contents of these files, and that the inspection not be limited to the files of inmates whose parole consideration proceedings had been recorded.

When the matter was heard on October 31, 1974, the court made it clear that the preliminary withholding of the documents was a violation of the discovery order and threatened defendants, and counsel for defendants, with contempt proceedings if this or any other violation of an order occurred. The court announced that a forthcoming written order would provide that (1)

the inmate files subject to inspection include the files of inmates whose parole consideration proceedings were not recorded; (2) the contents of the files to be produced for inspection must include *all* material in the file; (3) plaintiffs could move for modification of the Order of August 12, 1974, to permit photocopying, and (4) plaintiffs' counsel could have the assistance of two certified law students in inspecting the files.

Plaintiffs then filed a motion for photocopying the contents of the inmate files, defendants filed opposition, and the matter was heard on November 21, 1974, whereupon the district court dictated in open court the text of the order to which this petition is addressed. The written order was signed on December 3, 1974, and is annexed in Exhibit D of the Appendix to this petition. This order reflects the court's determinations of October 31, 1974, and November 21, 1974, and incorporates by reference the order of August 12, 1974.

On December 13, 1974, defendants filed in the United States Court of Appeals for the Ninth Circuit a petition for writ of mandamus and/or prohibition, an application for stay of the discovery order and an application for immediate stay. The immediate stay was granted on December 13, 1974. On December 18, 1974, the Court of Appeals issued its order denying the petition for writ of mandamus and vacating the immediate stay. A copy of this order is annexed in Exhibit C of the Appendix to this petition.

2. *The contents of personnel files and of other specified categories of confidential documents* (USDC



Order of June 20, 1974; Court of Appeals Opinion denying mandamus in Action No. 74-2206 filed January 17, 1975):

In June 1973, plaintiffs served a "Request for Production of Documents." Request No. 7 seeks production of the personnel files of each member, each hearing representative, and of the executive officer of the state parole board. Requests numbered 14, 15, 18, 20, 21, and 22 each relate to various specified categories of departmental documents.[3] Defendants objected to these requests for documents upon the grounds that the documents were irrelevant, confidential, and privileged. In March of 1974, plaintiffs moved for an order compelling the discovery of these documents, including discovery of the personnel files. The matter was briefed, argued and submitted before the United States magistrate, who on April 24, 1974, issued Findings and Recommendations, including a recommendation "that with respect to plaintiffs' motion for production of documents the same be granted as to each and every item." A copy of the magistrate's Findings and Recommendations are annexed hereto in Exhibit B of the Appendix to this petition.

Upon defendants' request for review, the district court on June 20, 1974, issued an order adopting the magistrate's Findings and Recommendations as the decision and order of the court with certain modifica-

[3]The text of these requests is quoted in footnote 5 of the opinion of the Court of Appeals in No. 74-2206 (Appendix, Ex. A, pp. v-vi).

tions, including a protective order limiting inspection of the personnel files to counsel of record and no more than a total of 2 investigators designated by such counsel and then only to the extent necessary to the conduct of this action. A copy of this order is annexed in Exhibit B of the Appendix to this petition. The district court's order further provided "that defendants' request for an *in-camera* inspection of the personnel files for a determination of the relevance and a balancing of the materiality of their contents prior to release of the files to plaintiffs is denied."

Defendants filed in the Court of Appeals a petition for writ of mandamus or prohibition and application for stay, whereupon the Court of Appeals granted a stay, required an answer to be filed to the petition and calendared the matter for argument on November 14, 1974. The matter was argued and submitted on that date, and on January 17, 1975, the Court of Appeals rendered its opinion denying the petition and vacating the stay. A copy of this opinion is annexed as Exhibit A of the Appendix to this petition.

**C. Other Discovery Afforded Plaintiffs.**

Plaintiffs have been afforded massive discovery independent of the discovery provisions herein sought to be reviewed:

(1) Interrogatories: Plaintiffs have propounded three sets of interrogatories which have asked hundreds of questions of each of the ten defendants. The last two sets of these interrogatories have focused on the parole consideration process and attendant circumstances.



(2) Requests for Admissions: Plaintiffs have propounded two sets of requests for admissions by each of the ten defendants, and each set has included well over 100 such requests. These requests for admissions have similarly focused on the parole consideration process.

(3) Request for Documents: Plaintiffs have propounded numerous requests for documents which seek production of all documents relating to dozens of specified categories of documents in the possession of or accessible to the Department of Corrections or the Adult Authority.

(4) Recordings: Plaintiffs have tape recorded in their entirety, including the deliberations of panel members, approximately 1,200 separate parole consideration proceedings.

(5) Visits and observations: Many persons are available to testify for plaintiffs with respect to the nature of the parole consideration process and of the interests at stake. Twenty-four attorneys designated by plaintiffs, including plaintiffs' counsel of record, have attended and taken notes at 160 parole consideration hearings. Many dozens of lay persons designated by plaintiffs have attended as operators of recording devices at a total of approximately 1,200 parole consideration hearings. Each member of plaintiffs' class (over twenty thousand prisoners) has participated in parole consideration hearings, and counsel for plaintiffs, as well as designees of such counsel, may interview these members of the class. In addition, plaintiffs may call members of the parole board, hearing of-

ficers of the parole board, and numerous correctional personnel who have personal knowledge of these proceedings.

(6) Depositions: Plaintiffs have taken lengthy depositions of nine members of the parole board, of the administrative officer of the parole board, of three parole board hearing officers, of a psychiatrist employed by the Department of Corrections, of a correctional counselor, and of two research supervisors of the Department of Corrections. The depositions of the parole board members and hearing officers focused on their backgrounds, education, and work experience, as well as on the parole consideration process. These depositions total over 1,400 pages in length.

(7) Inmate files: Under order of the district court, plaintiffs are entitled to examine the contents of the correctional files of any 200 inmates designated by them. The number of items which are highly confidential and entitled to protection under a qualified privilege of non-disclosure, as asserted herein, is small when compared with the total contents of the files. Plaintiffs will be authorized to examine this larger portion of the contents of inmate files, with respect to which a qualified privilege is *not* asserted, regardless of the outcome of this petition.

As a result of the discovery outlined above, plaintiffs have an abundance of information and sources of information bearing on (1) the background, possibility of bias, and competence of parole board members and hearing representatives; (2) the nature of parole consideration proceedings, the manner in which they



are conducted, the interests at stake, the kind of information relied on, and the factors and circumstances considered in arriving at decisions as a result of these proceedings; (3) the ability or capacity of inmates to handle themselves at such proceedings; (4) whether inmate files, upon which hearings panels rely, contain incomplete, misleading, or false information.

---

## SUMMARY OF ARGUMENT

The district court's discovery orders are not only indiscriminate (they require production of all personnel records of all parole board members and hearing officers and all contents of all correctional files of any 200 inmates designated by plaintiffs), the orders also preclude any attempts by defendants to segregate particular confidential documents for an informed determination by the district court of whether their confidentiality is outweighed by any utility the documents may have to the plaintiffs in their action below.

Under Rule 26(b)(1), Federal Rules of Civil Procedure, the federal courts recognize a qualified privilege to protect confidential government documents from unnecessary disclosure. The qualification of the privilege is that a confidential document may be ordered disclosed if its confidentiality is outweighed by the utility of the document to the proponent of its discovery in the pending action. This qualified privilege extends to confidential state government docu-

ments. The personnel files of members and hearing officers of a state parole board, as well as specified confidential portions of the contents of correctional files of state prisoners are confidential in nature. Indeed, by virtue of the protective provisions, even though inadequate, in the discovery orders, the magistrate and each of the judges below recognized that these categories of documents are confidential.

These categories of documents are of no apparent utility to the plaintiffs in this civil rights class action brought by state prisoners to determine what process is due at administrative proceedings concerning parole or discipline. Plaintiffs have been furnished massive discovery of the nature of these proceedings and of the interests they involve.

Under the circumstances of this case it was proper for counsel, the attorney general, to assert the qualified privilege. First, unlike an absolute privilege, the assertion of a qualified privilege does not call for abdication of judicial control over the evidence, but seeks an affirmative exercise of judicial control. Second, as the confidential nature of the documents is apparent and was recognized by the judges below, a formal writing from the head of the department which controls the documents was not necessary. Third, in asserting the qualified privilege, the attorney general acted on behalf of a party to the action who was, in fact, the head of the department which controls the documents ordered produced. Fourth, with respect to the confidential contents of inmate files, a more particularized and formal assertion of confidentiality is



impossible until the files to be produced are designated by plaintiffs. Accordingly, the reasons heretofore relied on for requiring a formal and personal assertion of privilege are absent.

Because the confidentiality of the documents is apparent, the utility of the documents is not apparent, and there is an abundance of alternate sources of information, the assertion by counsel of the qualified privilege of non-disclosure should not have been rejected without an *in-camera* inspection and informed balancing by the court of the competing interests involved.

The qualified privilege should not be viewed by the courts with hostility as an impediment to disclosure of the truth in pending litigation. Unlike an absolute privilege, the qualified privilege does not block information from the court, but only from an adversary, and then only where legitimate public policy favoring confidentiality outweighs the litigant's need for the information in the pending action. The compelled indiscriminate production of the documents for adversary inspection will not enhance the court's search for the truth. Even if the contents of the documents are highly relevant and material to the subject matter of the action (in which case the documents would probably be ordered produced anyway, after an *in-camera* inspection and balancing), there is no requirement that plaintiffs furnish them to the court. Indeed, to the extent that documents would tend to undermine plaintiffs' allegations, it is likely counsel would not volunteer them for the court's consideration.

The compelled disclosure of confidential government documents under a protective order is neither the equivalent of, nor an adequate substitute for, a qualified privilege of non-disclosure, and is not the equivalent of an informed and particularized exercise of judicial discretion.[4] Neither the magistrate nor the district judge examined any of the documents prior to compelling their disclosure for adversary inspection.

Relief from the requirements of the district court's discovery order is available in no other court, and review on appeal after judgment in the district court will be inadequate to cure the irreparable harm which will result from adversary inspection of the confidential documents.

The standard for when mandamus should be granted to review interlocutory discovery orders differs between the Courts of Appeals. The Court of Appeals in this case relied on an extraordinary standard in denying mandamus. There is a need to delineate uniform standards for when mandamus should be granted to review such orders, and the need is especially great

[4]The protective provisions are illusory and inadequate. Although the protective orders limit inspection of the actual documents, the use of copies is less limited, and discussion of their contents is not limited. Use of the documents is limited only by a vague standard: to the extent necessary to the conduct of this action. The orders do not specify what measures must be taken by counsel (there are presently 7 counsel of record for plaintiffs, from at least 4 different law firms) or their investigators to assure compliance with the protective provisions, nor are there provisions for the ultimate disposition of copies, or copies of copies, which counsel may make of the documents. The risk of irreparable harm from further disclosure of the documents or their contents, through mistake, inadvertence, or otherwise, will continue beyond the termination of this litigation.



in actions initiated by state prisoners against state officials.

To the extent the term "privilege" in Rule 26(b)(1) takes its meaning from the law of evidence, section 501 of the Federal Rules of Evidence can be expected to generate divergent views concerning the discovery of confidential government documents. This circumstance also increases the need for advisory mandamus. Certiorari should be granted to review this aspect of the decisions below and to announce a uniform standard for mandamus.

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## REASONS FOR GRANTING THE WRITS

### I

### THE DECISIONS BELOW RAISE EXCEPTIONALLY SIGNIFICANT PROBLEMS CONCERNING THE SCOPE OF DISCOVERY OF CONFIDENTIAL GOVERNMENT DOCUMENTS IN FEDERAL CIVIL RIGHTS ACTIONS BROUGHT BY PRISONERS AGAINST STATE OFFICIALS.

It has been estimated that assertions of privilege constitute a large percentage of all judicial determinations of objections to discovery. 4 Moore's Federal Practice, ¶26.83 [9.-3], fn. 33, at page 26-627 (27%). During discovery in civil rights actions brought by prisoners, these questions nearly always arise. Yet, the meaning of privilege, and judicial treatment of assertions of privilege, remain uncertain and in flux between the federal courts.

The present case exposes important harmful effects which these uncertainties impose on the administra-

tion of civil justice, as well as the need for this Court to delineate workable uniform standards for the assertion and treatment of claims under this paramount limitation of the scope of discovery.

In *United States v. Reynolds,* 345 U.S. 1 (1953), this Court stated that "privileged" as used in the rules for discovery should be understood as the term is used in the law of evidence, and that privilege is to be asserted formally by the head of the department controlling the matter after he has actually personally considered the documents with respect to which a privilege is asserted. 345 U.S. at 6, 7-8.

**A. It Was Impossible to Follow Reynolds to Protect The Inmate Files.**

By its terms, the discovery order for production of inmate files precludes attempts to meet the procedures of *Reynolds.* Until the plaintiffs designate the 200 inmates whose files are to be produced, it is impossible to actually consider the particular documents whose confidentiality will be jeopardized. When the first group of about 20 inmates was designated, attempts to segregate particular documents for such consideration were met with threats of contempt. The resulting order makes it unmistakably clear that nothing may be withheld from immediate production on demand by plaintiffs:

> "All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters, or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (USDC order, December 3, 1974, Appendix, Exhibit D, page xxvi).



**B. The Definition of "Privilege" Should Be Re-evaluated.**

The reference in the *Reynolds* opinion to the law of evidence for a definition of the term "privilege" as used in discovery is unworkable. Rule 26(b)(1) states that the inadmissibility at trial of the information sought is no ground for objection to a discovery demand. Indeed, in federal civil actions the law of evidence concerning privilege for confidential state government documents is indefinite and will likely remain so in view of the provisions of section 501 of the new Federal Rules of Evidence.[5] Without delineating standards for doing so, this section invites ad hoc determinations of claims of privilege.

The "law of evidence" lacks both the flexibility and the precision to accommodate the range of competing interests involved in pre-trial discovery demands for the disclosure of government documents which are confidential. Whether particular documents are *confidential* depends neither on the law of evidence nor

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[5] ARTICLE V. PRIVILEGES

**Rule 501.**

**GENERAL RULE**

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

on the nature of the pending action, but on independent interests and policies. Whether documents which are confidential should nevertheless be disclosed should depend on the needs and circumstances peculiar to the pending action.

For discovery purposes, "privileged" should be taken to mean that a particular document which is confidential need not be disclosed because its confidentiality is not outweighed by its utility and necessity in the pending action. See *Frankenhauser v. Rizzo,* 59 F.R.D. 339, 342, 344 (E.D.Pa. 1973).

**C. May "Privilege" Be Raised by Counsel?**

Under the circumstances of this case it was appropriate and permissible for counsel to assert a qualified privilege of non-disclosure. The reasons for the procedure in *Reynolds* that privilege be asserted as a formal matter by the head of the department having control over the documents, and then only after having personally considered each document, are absent in the present case.

First, in *Reynolds* an absolute privilege was asserted such that not even the district court was permitted to see the documents to consider whether the privilege was well taken. Secondly, the confidential nature of the documents sought in *Reynolds* was not apparent until the court was furnished the writings which comprised the formal assertion of privilege. Third, the head of the department having control over the documents in *Reynolds* was not a party to the action before the court.



In the present case only a qualified privilege was asserted with the realization that disclosure *in camera* would be appropriate for a determination of whether the utility and necessity of the documents outweigh their confidentiality. Second, the confidential nature of the documents in question is apparent and was recognized below by the insertion of at least some protective provisions in the discovery orders. Third, the head of the department having control over the documents, namely, petitioner Procunier, was a party defendant below on whose behalf the attorney general acted in asserting the qualified privilege. Fourth, under the December 3, 1974 discovery order it is impossible for the department head to meet the review process of *Reynolds* prior to disclosing the documents for adversary inspection. Fifth, as the documents in the present case were to be presented to the court for an *in-camera* inspection and balancing of the competing interests, the court was called upon to exercise direct control over the evidence and not to abdicate such control to the unfettered discretion of the department head. Sixth, the utility of these documents to plaintiffs is not apparent. Seventh, the possible necessity of these documents to plaintiffs' case is remote in view of the abundance of alternative sources of information available to pursue the points to which the documents are said to relate.

There are additional reasons for re-evaluating the reliance *Reynolds* would place on the personal judgment of the head of the department in determining whether confidential documents should be disclosed. First, the policies and interests on which the depart-

ment would rely are different from the policies on which the court would rely to evaluate the claim of privilege. Indeed, the department head would be ill-equipped to use the same policy considerations used by the judge. The judge must weigh the confidentiality of the documents against their utility and necessity in the pending action. The department head does not balance competing interests of the litigants,[6] but merely informs the court of the confidentialty of the document. In the present case, the personal judgment of the department head is not necessary to inform the court that employee personnel files are of a confidential nature. Whether the confidential documents are also privileged would depend on the circumstances of this particular case, and, as *Reynolds* states, this determination is for the court and not the executive.

Second, the interests involved in protecting these confidential documents from needless disclosure are not limited to those of the department or of the department head. In this case, not only are departmental interests and institutional security at stake, but also the privacy and safety of other individuals are jeoparized by the compelled disclosure of confidential informers' statements, personnel files, investigative reports on visitors, crime partner information, and other sensitive categories. The courts, no less than the department head, have reason to not needlessly jeopardize such third party interests.

[6]In the present case, defendants' offer to reevaluate the confidentiality of particular documents in light of specifications by plaintiffs of their need for them, was made for the purpose of saving the district court from unnecessary *in-camera* inspection.



**D. The Treatment of Confidential Matters:**

The decisions below raise serious questions concerning the treatment which should be accorded confidential state government documents not protected by a recognized absolute privilege.

The district court refused defendants' request for an *in-camera* inspection of the personnel files to determine whether their confidentiality is outweighed by their utility and necessity to plaintiffs in the pending action. The district court's indiscriminate treatment of the confidential items in inmates' files is more aggravated and precludes an opportunity to segregate particular documents for such an *in-camera* inspection prior to disclosure to plaintiffs. Instead, the district court compelled disclosure of the documents under a protective order purporting to limit plaintiffs' use of them.

If the confidentiality of these documents outweighs their utility and necessity to plaintiffs in the pending action, the documents are entitled to a privilege against *any* disclosure. The protective order is no substitute for the informed judicial discretion which would result from an *in-camera* inspection and balancing of the competing interests, and is not the equivalent of a privilege against disclosure if appropriate upon such inspection and balancing. Protective orders, more extensive than were provided in the present case, would be appropriate if, after an *in-camera* inspection and balancing, the court determined that the utility and necessity of the documents outweighed their confidentiality and compelled

their disclosure. However, where, as here, the confidentiality of the documents is apparent, and their utility and necessity to the action is not apparent, these confidential state government documents, at the minimum, should be entitled to an *in-camera* inspection and informed balancing of competing interests prior to their compelled disclosure for adversary inspection. Any less informed treatment of such documents unnecessarily jeopardizes exceptionally significant interests. In this case the discovery is demanded by counsel for a class of plaintiffs which includes every male felon in prison or on parole in California, and the information demanded will invade the personal privacy of the members of the parole board and jeopardize the personal safety of prisoners who have given information in confidence against other prisoners.

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## II

### THE DECISIONS BELOW RAISE IMPORTANT QUESTIONS CONCERNING THE STANDARD FOR WHEN MANDAMUS SHOULD BE GRANTED TO REVIEW INTERLOCUTORY DISCOVERY ORDERS.

The likelihood of immediate irreparable harm to the important third party interests involved, the large number of actions brought by prisoners, and the little guidance for the court's ad hoc determinations of qualified privilege are circumstances indicating a need for mandamus proceedings to review interlocutory discovery orders.

In the present case the district court's discovery orders will result in prejudice to the defendants as



important as the prejudice which may result from the erroneous granting of the ultimate relief demanded in the action. Indeed, the harm which can be caused by these discovery orders is irreparable, whereas the harm which could be caused by the erroneous granting of the ultimate relief in the action would be subject to cure on appellate review. The problem is especially acute in the present case where (a) plaintiffs are state prisoners; (b) defendants are members of the state parole board and the state director of corrections; (c) the confidentiality of the state government documents is apparent and involves not only significant departmental interests, including institutional security, but also involves the personal safety and privacy of third persons; (d) the utility and necessity for the documents to plaintiffs in the pending action is not apparent.

Under the provisions of section 501, Federal Rules of Evidence, it would appear that the standards for assertion and treatment of privilege will evolve on a case by case basis with little guidance for the courts' ad hoc determinations.

The standard for granting mandamus to review interlocutory discovery orders should be akin to the standard of review on appeal to which the interests at stake would be entitled but for the risk of intervening irreparable harm. Interlocutory review should be available under Title 28 United States Code section 1651 not only to cure a usurpation of power, an act in excess of jurisdiction, or a failure to exercise jurisdiction, but also to save important public

and private interests from irreparable harm attributable to a discovery order which the district court had "jurisdiction" to enter, but which is clearly or plainly erroneous.[7] See *United States Board of Parole v. Merhige,* 487 F.2d 25 (4th Cir. 1973), cert. denied sub nom. *Merhige v. United States Board of Parole,* ..... U.S. ..... (1974).

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## III

### THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS CONCERNING THE STANDARD FOR WHEN TO GRANT MANDAMUS TO REVIEW INTERLOCUTORY DISCOVERY ORDERS.

There is a variance between the Courts of Appeals with respect to the standards for when mandamus should be granted to review interlocutory discovery orders. See 4 *Moore's Federal Practice,* ¶26.83[9.-3]; Supervisory and Advisory Mandamus Under the All Writs Act, 86 Harvard Law Review 595 (1973). The opinion of the Court of Appeals in No. 74-2206 acknowledges that this standard is in flux between the circuits and that there is authority for lessening the extraordinary showing necessary to invoke mandamus. (Appendix, Exhibit A, fn. 6 at pages vi-vii).

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[7]Even under the extraordinary standard used by the Court of Appeals in this case, mandamus should have been granted. Under Rule 26(b)(1), a district court lacks authority to compel production of privileged matter. As the confidentiality of the documents is apparent, and their utility not apparent, the documents are privileged from disclosure, until the court has looked at them, balanced the competing interests, and determined their utility and necessity to plaintiffs outweighs their confidentiality.



The Court of Appeals opinion in the present case refers to three different standards: (1) mandamus is appropriate where the district court has exceeded its jurisdiction, improperly failed to exercise jurisdiction, or has taken action amounting to a usurpation of power; (2) mandamus is appropriate where ordinary remedies are inadequate and there are present exceptional and extraordinary circumstances which require the issuance of the writ to present a grave miscarriage of justice; (3) madamus is appropriate depending on the degree to which the district court's actions can be legally questioned, the damage to petitioner which is not correctable on appeal, and the ability to correct the district court's actions by appeal.

The Court of Appeals for the Eighth Circuit would grant mandamus to review an interlocutory discovery order which presented a "really extraordinary" question and where appeal after disclosure would be inadequate. *Pfizer v. Lord,* 456 F.2d 545, 548 (8 Cir. 1972). In the Court of Appeals for the Seventh Circuit, mandamus may be granted to review such orders where there is a question of substantial importance and where appeal would be inadequate. *Harper and Row Publishers, Inc. v. Decker,* 423 F.2d 487, 492 (7th Cir. 1970), affirmed, 400 U.S. 348 (1971) (by an equally divided court). The Court of Appeals for the Fourth Circuit has granted mandamus to review and vacate an interlocutory discovery order on the ground that the order was clearly erroneous. *United States Board of Parole v. Merhige, supra,* 487 F.2d 25 (4th Cir. 1973).

In summarily denying the petition for mandamus in No. 74-3392 (Appendix, Exhibit C), the Court of Appeals may be assumed to have applied the extraordinary standards to which reference is made in the Opinion in No. 74-2206. The two judges who participated in No. 74-3392 also participated in No. 74-2206.

These conflicts justify the grant of certiorari to review the decisions below.

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## IV

### THE FOURTH AMENDMENT PRECLUDES COMPELLING PRODUCTION OF CONFIDENTIAL DOCUMENTS WITHOUT A PRIOR DETERMINATION THAT THE DOCUMENTS ARE NOT PRIVILEGED.

As the decisions below violate the fundamental right to be free from unreasonable search and seizure, they must be rectified. Expectations of privacy, insofar as they are reasonable, are protected by the Fourth Amendment. Compulsory process for the production of documents may not issue in derogation of the Fourth Amendment. An order compelling the disclosure of privileged documents is not authorized by statute, and is as defective as is a search warrant issued without probable cause. An order compelling the production of confidential documents without a prior determination that their utility in the litigation is paramount, is as defective as is a general search warrant.



The essence of the Fourth Amendment is the protection of reasonable expectations of privacy. When a person communicates information to government officials in confidence, he may reasonably expect that the confidence will be maintained unless a justification for disclosure is found to outweigh the jutification for confidentiality. In such circumstances, the expectation is not that disclosure is inevitable *(see Couch v. United States,* 409 U.S. 322, 335 (1973)), but rather that confidentiality will be asserted. Similarly, when a government official's duties include control over confidential documents, he may reasonably expect that he will not be compelled to disclose the information unless the justification for disclosure is found to outweigh the reasons for confidentiality. In such circumstances, the official cannot be said to be assuming a duty to disclose the documents *(see Davis v. United States,* 328 U.S. 582, 589-590 (1946), but rather is assuming a duty to assert the confidentiality of the documents. In short, as it is reasonable to expect that confidential documents will not be disclosed unless it is shown that the justifications for disclosure are paramount, such expectation is protected by the Fourth Amendment.

It was recognized early in our history that the essence of a search and seizure is not the physical intrusion and taking of property, but is the element of compulsion. See *Boyd v. United States,* 116 U.S. 616, 621-622 (1886). Compulsory process for the production or inspection of documents is thus subject to the limitations inherent in the Fourth Amendment.

See *United States v. Dionisio,* 410 U.S. 1, 11 (1973); *See v. City of Seattle,* 387 U.S. 541, 544-545 (1967). Accordingly, an order pursuant to Rule 37 of the Federal Rules of Civil Procedure, compelling a party to produce documents, is subject to the limitations of the Fourth Amendment.

Just as a search warrant may issue only upon probable cause, compulsory process may issue only upon statutory or constitutional authorization. See *Okla. Press Pub. Co. v. Walling,* 327 U.S. 186, 209 (1946). Rule 26(b)(1) of the Federal Rules of Civil Procedure explicitly excepts from discovery matters which are privileged. Confidential state documents are privileged unless there is a showing and a determination that their utility in the litigation is paramount to their confidentiality. Accordingly, a court order compelling the production of confidential documents, without an *in-camera* inspection and determination, is necessarily an order compelling the production of privileged documents. As such an order is explicitly precluded by Rule 26(b)(1) of the Federal Rules of Civil Procedure, it is analogous to the issuance of a search warrant without probable cause.

Moreover, there is no constitutional authorization for compelling the production of confidential documents without any informed assessment as to whether or not their utility in the litigation is paramount. As it is reasonable to expect that disclosure will not be compelled in the absence of such a determination, the Fourth Amendment precludes the issuance of



such an order. The Fourth Amendment precludes the conclusion that simply by virtue of having been named as a defendant in a civil proceeding, the defendant must forfeit all confidential documents regardless of their utility in the litigation.

Even when compulsory process is issued pursuant to a statutory or constitutional authorization, it runs afoul of the Fourth Amendment if the specification of the documents is inadequate or excessive. See *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 208-209 (1946); *United States v. Morton Salt Co.,* 338 U.S. 632, 652 (1950). "'[A]dequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry,' (citation omitted)." *McPhaul v. United States,* 364 U.S. 372, 382 (1960). Accordingly, where the precise content of the documents is not known, greater latitude is reasonable. See *McPhaul, supra,* 364 U.S. at 382. Conversely, where as here the precise contents of confidential documents can be known by examination of the documents *in camera,* a general order compelling their production is clearly unreasonable.

Legitimately authorized compulsory process is similarly invalid under the Fourth Amendment if the documents sought are not reasonably relevant to the underlying purpose of the authorization. See *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 208-209 (1946); *United States v. Morton Salt Co., supra,* 338 U.S. 632, 652 (1950). By its terms the underlying purpose of Rule 26(b)(1) is to authorize the discovery

of matters which are not privileged. If confidential documents are privileged because their utility in litigation is outweighed by the need for confidentiality, such documents may not at the same time be deemed to be discoverable within the meaning of Rule 26(b)(1). Accordingly, a general order for the production of confidential documents without a prior showing and determination that the utility of the documents in the litigation outweighs the interest in confidentiality is unreasonable.

"The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 208 (1946). When the Federal Rules of Civil Procedure are utilized to vitiate this protection, intervention by this Court is warranted. As observed by Mr. Justice Holmes: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *Fed. Trade Com. v. Amer. Tobacco Co.,* 264 U.S. 298, 306 (1924).



## V

**SPECIAL REASONS JUSTIFY GRANTING A WRIT OF CERTIORARI TO REVIEW THE DISTRICT COURT'S DISCOVERY ORDER OF DECEMBER 3, 1974, AND RELIEF FROM THIS ORDER IS NOT AVAILABLE IN ANY OTHER COURT.**

The district court's discovery order of December 3, 1974, indiscriminately compels the production for adversary inspection and copying all of the contents of all of the correctional files of any 200 state prison inmates designated by plaintiffs. By its terms, the order also makes compliance with the *Reynolds* procedures impossible, as the order precludes any attempt to segregate particular confidential documents for any purpose prior to plaintiffs' inspection and copying of them.

The protective provisions of the district court's order are illusory and patently inadequate. The order limits physical inspection of the documents to counsel of record for plaintiffs and to no more than two other persons each of whom must be a member of the bar or a certified law student. However, there are presently seven attorneys of record for plaintiffs, from at least four different law firms. Thus nine persons are presently eligible to physically inspect the inmate files.

The discovery also provides that plaintiffs may make photocopies of any and all contents of the 200 inmate files. Two protective provisions, also illusory, apply to this part of the order. The order requires plaintiffs' counsel to obtain the consent of inmates prior to making photocopies of the contents of their

files, and also provides that the photocopies may not be used except as necessary to acquittal of their duties of representation in this case. However, the highly confidential items in an inmate's file include items with respect to which the inmate's consent for copying is irrelevant. Such items include reports from confidential informants against the inmate, investigative reports of certain visitors, sensitive clinical or psychiatric data concerning the inmate, and confidential communications from third parties including judges, district attorneys, and other persons outside the prison system.

The restriction of the use of photocopies is an illusory reliance on the self-restraint of a vigorous advocate, and would provide no adequate relief from the disclosure, through inadvertence or mistake, of information which would jeopardize the personal safety or invade the personal privacy of other persons. Plaintiffs' attorneys in this action represent every adult male felon in prison or on parole in the California state prison system. The courts are aware that there are inmate factions, and that the competition between such factions includes threats, intimidation, blackmail, extortion, and violence. By virtue of the class designation in the action below, counsel for plaintiffs represent and have access to inmates included in all of these factions.

The possible utility in this action of the information in these relatively few highly confidential items in the inmate files is very remote. The harm which can result from any improper disclosure or use of copies



of the documents or their contents is significant. Neither this harm, nor the risk of harm could be corrected on appeal after disclosure of the documents.

Relief from the district court's order of December 3, 1974, is not available in any other court. Repeated assertions of the confidential nature of the contents of the inmate files, and repeated requests for an *in-camera* inspection of them prior to disclosure for adversary inspection were rejected by the district court. Preliminary steps taken to segregate particular confidential items from the inmate files which have to this point been designated by plaintiffs were met with threats of contempt proceedings against defendants and defendants' counsel. These preliminary steps resulted in the peculiarly detailed provision in the district court's order that all of the contents of all of the files of the inmates designated by plaintiffs must be furnished ". . . without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (Appendix, p. xxvi).

Defendants' prompt attempt to obtain review by mandamus proceedings in the Court of Appeals was summarily denied by that court.

## CONCLUSION

For the above reasons, petitioners respectfully request this Court to issue writs of certiorari to the United States Court of Appeals for the Ninth Circuit, and to the United States District Court for the Northern District of California, to review and reverse the decisions in this case.

Dated, February 14, 1975.

Respectfully submitted,

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**(Appendix Follows)**

# APPENDIX

**Exhibit A**

United States Court of Appeals
for the Ninth Circuit

No. 74-2206

HENRY W. KERR, CURTIS O. LYNUM, WALTER A. GORDON, JR., MANLEY J. BOWLER, LELAND M. EDMAN, JAMES H. HOOVER, CHARLES E. BROWN, DANIEL R. LOPEZ, individually and in their official capacities as members of the California Adult Authority, JOSEPH A. SPANGLER, individually and in his official capacity as Administrative officer of the California Adult Authority, RAYMOND K. PROCUNIER, individually and in his official capacity as Director of Corrections of the State of California; their agents, employees, and successors in interest,

*Petitioners,*

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,

*Respondent,*

JOHN VAN GELDERN, DANNY JONES, CHARLES EDWARD VAN NORT, BILLY RAY LEWIS, ROBERT NEWTON GARDNER, JR., JAMES MURRIN, GEORGE CHATFIELD, individually and on behalf of all others similarly situated,

*Real Parties in Interest.*

[January 17, 1975]

On Petition for Writ of Mandamus
or Prohibition

## OPINION

Before: HAMLEY, MERRILL and DUNIWAY, Circuit Judges.

HAMLEY, Circuit Judge:

Petitioners seek from this court a writ of mandamus or prohibition under 28 U.S.C. § 1651, vacating an

order of respondent district court which granted a motion of the real parties in interest requiring petitioners to produce various documents by way of discovery under Rules 34 and 37 of the Federal Rules of Civil Procedure. We deny the petition.

The real parties in interest, who seek the documents, are seven California state prisoners who have joined as plaintiffs in a civil rights action against petitioners in the respondent district court.[1] Plaintiffs in that suit assert district court jurisdiction under 28 U.S.C. § 1343, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. Plaintiffs brought the action on behalf of themselves and of a class, divided into several subclasses, consisting of all others similarly situated.[2]

Petitioners in this mandamus proceeding are the defendants in the civil rights action described above. They constitute the members of the California Adult Authority, two state administrative officers, their agents, employees and successors in interest, as described in the caption of the complaint.

Plaintiffs in the civil rights action seek both declaratory and injunctive relief. They request a declaratory judgment that the acts of the defendants pertaining to the revocation, rescission or suspension of parole, the fixing or refixing of sentences, and the imposition of sanctions for alleged infractions of rules, as described in numerous paragraphs of the complaint, contravene the rights of the plaintiffs and their class under the Fifth, Sixth and Eighth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

[1] In the district court the civil rights action carries docket number C-72-2088 SAW.

[2] After the petition was filed in this court, the district court entered an order providing that the suit could be maintained as a class action.



The injunctive relief plaintiffs seek is an order requiring defendants and their agents to accord plaintiffs and their class certain specified procedural rights with regard to all proceedings for the revocation, suspension or rescinding of parole, the fixing or refusing to fix the terms of sentences, and the imposing of serious disciplinary sanctions. The rights sought pertain to giving notice of such proceedings, providing an opportunity to be heard, to present witnesses, and to cross-examine witnesses; according the right to be represented by counsel; providing the right to be heard by an unbiased panel or official and the right to challenge any panel or official for cause; and providing a verbatim transcript of any such hearing and a written statement of the reason for the action taken and the evidence relied on.

During the course of discovery in the civil rights action, plaintiiffs served upon petitioners a set of interrogatories under Fed. R. Civ. P. 33 and a request for production of documents under Fed. R. Civ. P. 34. Petitioners made objections to the requests for documents and to certain interrogatories. As to the requested documents, petitioners also argued that an *in camera* inspection was necessary in order to determine relevancy and evaluate their claimed privileges.

Plaintiffs thereupon moved under Fed. R. Civ. P. 37 to compel discovery. The district court referred the motion to a United States magistrate for findings and recommendations.

Following a hearing, the magistrate recommended that all requests for production of documents be granted, that some but not all of the interrogatories be answered, and that costs in the amount of $500 be levied against petitioners under Fed. R. Civ. P. 37(a)(4). Protective orders concerning certain of the document requests were also suggested.[3]

Petitioners sought a review by the district court of the magistrate's findings and recommendations, complaining primarily about the granting of the requests for the production of documents. After such a review, the district court, with reference to the documents here in issue, followed the magistrate's recommendations, including denial of the request for *in camera* inspection. However, the district court modified the recommended protective order by being more restrictive of the persons to whom the documents in request number seven could be revealed.[4] Subsequently,

[3]Several document requests were subject to a limited time period. And with reference to request number seven, the magistrate advised limiting the revelation of the documents to plaintiffs' attorneys and the personnel in their offices.

[4]The protective order with reference to request number seven, as entered by the district court, reads:

> "[T]hat no . . . file of any plaintiffs, or any copy of any of its contents, and no personnel file of any member of the Adult Authority, hearing representative or executive officer, nor any copy of any of its contents, shall be shown to any person except counsel of record for the plaintiffs and no more than a total of two investigators designated by such counsel, and then only to the extent necessary to the conduct of this action."



the district court refused to stay the discovery order pending the disposition of this petition.

Being dissatisfied with the district court's order under Fed. R. Civ. P. 37, petitioners instituted this mandamus or prohibition proceeding and requested a stay pending its disposition. The petitioners contend that it was improper for the district court to allow discovery of the documents requested under Fed. R. Civ. P. 34, specifically those sought in requests numbers 7, 14, 15, 18, 20, 21 and 22 of the plaintiffs' request for production of documents.[5] This court

[5]The requests for documents at issue are:

> "7. All files, including all personnel files, which are maintained by the Adult Authority or by the Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the Executive Officer of the Adult Authority."
> "14. Each report submitted by any member, hearing representative, Executive Officer, or any other employee or official of the Adult Authority, including without limitation all reports of the type indicated at lines 9-11 of page 21 of the aforementioned deposition."
> "15. All written statements written or delivered by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years favoring, opposing, or in any way commenting upon bills or other legislation or legislative proposal pending in the U.S. House of Representatives, the Senate of the United States, or the California Legislature."
> "18. All written proposals for any change whatsoever in the organization or operation of, qualifications for, or substantive criteria and procedures to be employed by the Adult Authority, including without limitation any of the individuals or groups listed in the foregoing item."
> "20. All memoranda written by the Chairman of the Adult Authority during the past 5 years, no matter to whom sent, including without limitation memoranda sent to other government organizations, agencies or officials, or to other members, hearing representatives, officials or employees of the Adult Authority."
> "21. All documents in effect on November 15, 1972 which pertain to any Policy Statement or Resolution issued by the Adult Authority, including without limitation any file maintained on any Resolution or Policy Statement and all such documents executed or issued subsequent to that date."
> "22. All documents, however formal or informal, issued during the *past calendar* year, which concern the Adult Authority's adoption

stayed the district court's order on September 20, 1974, at which time it also designated this petition for oral argument.

Preliminarily, it is necessary to examine the nature of the vehicle which brings the district court's order before this court for review. This is a petition for mandamus or prohibition pursuant to the All Writs Act, 28 U.S.C. § 1651. Mandamus is an extraordinary remedy. It is appropriately exercised where the district court has exceeded its jurisdiction, or has improperly failed to exercise jurisdiction, or has taken action amounting to an "usurpation of power." *Will v. United States,* 389 U.S. 90, 95-96 (1967); *Roche v. Evaporated Milk Ass'n.,* 319 U.S. 21, 26 (1943). This court set out its standard for granting mandamus in *Hartley Pen Co. v. United States District Court, etc.,* 287 F.2d 324, 328 (9th Cir. 1961).

> "In our view the remedy is available in an ordinary case within our jurisdiction if ordinary remedies are inadequate and there are present exceptional and extraordinary circumstances which require the issuance of an extraordinary writ to prevent a grave miscarriage of justice. . . ."[6]

of new policies, procedures, criteria, and the like, to be followed by members, hearing representatives, officials and employees, including without limitation all documents relating to a) Policy Statement No. 24, adopted March 27, 1973, and b) Resolution No. 129, revised and reissued May 21, 1973."

[6]The standard, for when mandamus should be granted to review interlocutory discovery orders, is in flux between circuits. 4 *Moore's Federal Practice* § 26.83 [9.—3] (2d ed., Supp. 1973). There is some authority



From an examination of *Hartley,* three factors are evident which determine the appropriateness of granting mandamus: the degree to which the district court's actions can be legally questioned, the damage to petitioner (not correctable on appeal), and the ability to correct the district court's actions by appeal. *See Heathman v. United States District Court,* 503 F.2d 1032 (9th Cir. 1974); *Belfer v. Pence,* 435 F.2d 121 (9th Cir. 1970).

Petitioners first direct their attention to the documents described in request number seven. *See* note 5, *supra.* These documents consist of the personnel files maintained by petitioners pertaining to each member of the Adult Authority, each hearing representative, and the Executive Officer of the Adult Authority. On the merits of the district court order, petitioners argue that the contents of these personnel files have no relevance to the subject matter of the civil rights action, and for this reason alone, the district court discovery order should be vacated with regard to request number seven.

One of the plaintiffs' allegations in their civil rights complaint is that members and executive personnel of the Adult Authority have "no expertise in arriving at fair decisions" because of their narrow partisan backgrounds, their bias against prisoners, their inexperience, and their failure to reflect a representative cross section of the population of California. As indi-

for lessening the extraordinary showing necessary to invoke mandamus. *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd.,* 400 U.S. 348 (1971) (by an equally divided court); *Pfizer, Inc. v. Lord,* 456 F.2d 545 (8th Cir. 1972).

cated by the earlier review of the relief sought in the civil rights suit, plaintiffs do not attack the qualifications of petitioners with an expectation of obtaining a judicial determination that an Adult Authority so constituted cannot accord due process to prisoners who come before them. Instead, they expect that, by proving such an allegation, they will demonstrate the need of imposing stringent procedural requirements governing the functioning of the Adult Authority.

Since this would appear to be a proper line of attack for plaintiffs, the district court's holding of the personnel files relevant for discovery purposes is not so questionable as to invoke mandamus. For the question of relevancy "is to be more loosely construed at the discovery stage than at the trial." 8 Wright & Miller, *Federal Practice and Procedure,* § 2008 at 41 (1970). Thus under Fed. R. Civ. P. 26(b)(1), it is no ground for objection that information sought in pretrial discovery would not be admissible at trial, " 'if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.' . . ." *Olympic Refining Company v.. Carter,* 332 F.2d 260, 266 (9th Cir. 1964). In addition to discovering information pertaining to a party's case in chief, it is entirely proper to obtain information for other purposes such as cross-examination of adverse witnesses. *See United States v. Meyer,* 398 F.2d 66, 72 (9th Cir. 1968).

Because the issue of relevancy in discovery matters is subject to such a broad standard, a district court's decision will rarely be overturned by a petition for



mandamus.[7] *Heathman v. United States District Court* 503 F.2d at 1035. *Cf. Hartley Pen Co. v. United States District Court,* 287 F.2d at 328-332.

Petitioners argue, however, that established principles of California law and federal law create an absolute or qualified privilege for the personnel files covered by request number seven and all documents sought under requests numbers fourteen, fifteen, eighteen, twenty, twenty-one and twenty-two, and for this reason discovery should not have been ordered. In the alternative, petitioners argue that, at the very least, the district court should have required *in camera* inspection to ascertain relevancy and judge the need to maintain the confidentiality of the Authority's files.

The claim of privilege under California law is based upon California Evidence Code § 1040, and California Government Code §§ 6250-6260 and 6254(f) (Supp. 1974). However, the civil rights action was instituted in federal court under a federal statute, 42 U.S.C. § 1983, which was enacted particularly to vindicate federal rights against deprivation by state action. *See Monroe v. Pape,* 365 U.S. 167, 180 (1961). As this court recently pointed out in *Heathman v. United States District Court,* 503 F.2d at 1034: "[I]n federal question cases the clear weight of authority and logic supports reference to federal law on the issue of the existence and scope of an asserted pri-

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[7] For an example of where the determination on relevancy was found extraordinary and mandamus invoked, *see Sanderman v. Winner,* ..... F.2d ....., No. 74-1477 (10th Cir. Nov. 26, 1974).

We make no inference as to whether the information contained in the personnel files would be admissible at trial, as against a claim that it is irrelevant.

vilege. 2B Barron & Holtzoff, *Federal Practice and Procedure* (Wright ed. 1961), § 967 at 243; 4 *Moore's Federal Practice,* § 26.60 [7] at 26-255; 8 Wright & Miller, *Federal Practice and Procedure,* Civil § 2016 at 123; *Proposed Federal Rules of Evidence,* Rules 501-02."

The states's interest is that of a litigant, and not, as in diversity cases, that of a sovereign whose law is being applied in a foreign forum. Reference to federal law in this case is necessary on the issue of the existence and scope of the claimed privilege. *Heathman v. United States District Court,* 503 F.2d at 1034; *Fears v. Burris Manufacturing Co.,* 436 F.2d 1357, 1360-1361 (5th Cir. 1971); *Carr v. Monroe Manufacturing Co.,* 431 F.2d 384, 387-389 (5th Cir. 1970); *Colton v. United States,* 306 F.2d 633, 636 (2d Cir. 1962).

Federal statutory law, the Freedom of Information Act, 5 U.S.C. §§ 552(b)(6) and (7), is relied upon by petitioners to sustain their asserted privilege. The purpose of this Act was to expand the access of the public to official records of federal agencies, subject to stated exceptions. Among the exceptions to disclosure are those set out in § 552(b)(6)—personnel and medical files, and section 552(b)(7)—"investigatory files compiled for law enforcement purposes."[8]

This Act would not create a privilege for the requested documents for two reasons. First, its lan-

[8]The section 552(b)(7) exception has no relationship with the kinds of documents plaintiffs seek to discover. *See Bristol-Myers Co. v. F.T.C.,* 424 F.2d 935, 939-940 (D.C. Cir. 1970).



guage is limited to authorities "of the Government of the United States." 5 U.S.C. § 551(1). The civil rights suit involves California agencies. Secondly, the exceptions to the disclosure in the Act were not intended to create evidentiary privileges for civil discovery. *See Verrazzano Trading Corp. v. United States,* 349 F.Supp. 1401, 1403 (Cust. Ct. 1972); *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 99 (W.D. Mo. 1973); *Hodgson v. GMAC,* 54 F.R.D. 445, 446 (S.D. Fla. 1972); 4 *Moore's Federal Practice* § 26.61 [4.—3] at 26-276, 26-278 (2d ed.). They were intended only to permit the withholding of certain types of information from the public generally.

Petitioners also contend that the common law governmental privilege (encompassing and referred to sometimes as the official or state secret privilege) covers the requested documents. *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792-795 (D.C. Cir. 1971); *Carr v. Monroe Manufacturing Co.,* 431 F.2d at 388-390.

These cases, however, indicate that this is only a qualified privilege, contingent upon the competing interests of the requesting litigant and subject to disclosure especially where protective measures are taken, as in this case. But we do not have to reach the question of whether this privilege extends to these documents or if a further protective order in the nature of *in camera* inspection was necessary before allowing disclosure. The governmental privilege must be formally asserted and delineated in order to be raised properly. *United States v. Reynolds,* 345 U.S.

1, 7-8, 10-11 (1953); *Carr v. Monroe Manufacturing Co.*, 431 F.2d at 387. *See General Services Administration v. Benson*, 415 F.2d 878, 879 (9th Cir. 1969). *Cf. United States v. Nixon*, ..... U.S. ....., ..... (July 24, 1974) ("by a formal claim of privilege"); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d at 792-793 (by implication).

In *United States v. Reynolds, supra*, the Supreme Court in discussing a claimed state secret privilege stated:

> "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. . . ." 345 U.S. at 7-8.

Neither the Chairman of the Authority nor the Director of Corrections nor any official of these agencies asserted, in person or writing, any privilege in the district court.

The claiming official must "'have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced'"[9] and state with specificity the rationale of the claimed privilege. *Reynolds* is illustrative. The Court there continued, explaining:

[9] *United States v. Reynolds*, 345 U.S. at 8 n. 20, quoting *Duncan v. Cammell, Laird & Co.* [1942] A.C. 624, 638.



> "Of course, even with this information before him, the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that *military secrets* were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made." (Emphasis added.) 345 U.S. at 10-11.

In the civil rights suit, petitioners' counsel merely raised a blanket objection covering any and all documents in request numbers 7, 14, 16, 18, 20, 21 and 22. Formally claiming a privilege should involve specifying which documents or class of documents are privileged and for what reasons, especially where the nature of the requested documents does not reveal an obviously privileged matter. *See Pleasant Hill Bank v. United States*, 58 F.R.D. at 101. Since there may be information in the requested documents which should be protected, the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek *in camera* inspection, at the time the documents are discovered in the district court. *See United States v. Reyonlds*, 345 U.S. at 10-11.

In sum, the petition fails to show such an usurpation by the district court that warrants the extraordinary

remedy of writ of mandamus. In promulgating the discovery order the district court did enter some protective measures. The granting of mandamus as to discovery orders is limited, and this case does not appear to present exceptional circumstances.

The stay of this court is vacated, and the petition for mandamus or prohibition is denied.



**Exhibit B**

United States District Court
Northern District of California

No. C-72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,
vs.
Henry W. Kerr, et al.,
Defendants.

[Filed Jun. 20, 1974]

**ORDER**

Plaintiff's motion filed pursuant to Rule 37, Federal Rules of Civil Procedure, for an order telling defendants to answer certain interrogatories propounded pursuant to Rule 33, Federal Rules of Civil Procedure, and to produce certain documents requested pursuant to Rule 34, Federal Rules of Civil Procedure, having been submitted in the first instance to United States Magistrate David R. Urdan, pursuant to this Court's order of July 13, 1973; and

Magistrate Urdan having filed and served, on April 24, 1974, his Findings and Recommendations with respect to the aforementioned motion; and

Defendants' request for review of the aforementioned Findings and Recommendations having regu-

larly come on for hearing before this Court on June 13, 1974, and good cause appearing therefor,

It Is Hereby Ordered that, except for the modifications indicated below, the aforementioned Findings and Recommendations be, and they hereby are, adopted and rendered as the decision and order of this Court;

And It Is Further Ordered that, defendants' objections are sustained with respect to Interrogatories Nos. 1 and 2, parts B, F, G, H, I, K, and L. Defendants are to answer parts D of Interrogatories Nos. 1 and 2, but may do so in a reasonably abbreviated fashion as will be worked out among counsel.

And It Is Further Ordered that, with respect to the answers provided in Interrogatories Nos. 1 and 2, and with respect to the documents provided in accordance with Items No. 1 and 7 of plaintiffs' request for production of documents, that no central file of any plaintiffs, or any copy of its contents, and no personnel file of any member of the Adult Authority, hearing representative or executive officer, nor any copy of any of its contents, shall be shown to any person except counsel of record for the plaintiffs and no more than a total of two investigators designated by such counsel, and then only to the extent necessary to the conduct of this action.

And It Is Further Ordered that defandants' request for an in-camera inspection of the personnel files for a determination of the relevance and a



balancing of the materiality of their contents prior to release of the files to plaintiffs is denied.

And It Is Further Ordered that defendants comply with this order within 20 days of the date hereof.

And It Is Further Ordered that, pursuant to Rule 7, Federal Rules of Civil Procedure, Defendants pay to plaintiffs the sum of $500.00 as the expenses reasonably incurred by plaintiffs in obtaining this order.

And It Is Further Ordered that defendants' request for a stay of the requirement of disclosure of personnel records pending disposition of any petition for mandamus, filed by defendants within five days of the date hereof, to review this part of the order is denied.

Dated: June 20, 1974

Stanley A. Weigel
United States District Judge

In the United States District Court for the Northern District of California

No. C-72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,
vs.
Henry W. Kerr, et al.,
Defendants.

[Filed Apr. 24, 1974]

## FINDINGS AND RECOMMENDATIONS

The matter of plaintiff's motion for an order compelling defendants to produce documents and to answer or further answer interrogatories was the subject of a hearing April 1, 1974, and thereafter submitted on the papers in the file and arguments of counsel. The defendants opposed the motion on the ground that a large number of the document requests and interrogatories are irrelevant to the action, as in the defendants' view the subject matter of the complaint concerns only past correctional procedures limited to whether proceedings relating to the seven named plaintiffs regarding their parole comported to applicable standards of due process. This objection is not valid because it misconstrues the subject matter of the case. The complaint seeks relief more extensive than that envisioned by the defendants, and therefore the



defendants' objection to some of the plaintiffs' discovery on the ground of irrelevancy is without merit.

The defendants object to certain other parts of the plaintiffs' discovery requests claiming that the information sought is privileged absolutely under certain California State statutes. It is my view that objections on that ground also are without merit for reasons expressed in plaintiffs' memorandum in support of the motion, and should be overruled. Two other general objections made by the defendants that appear from time to time in their opposition to the plaintiffs' discovery requests, namely, that some create an undue burden upon the defendants; or, that the requests are not sufficiently detailed in that certain document requests are not specific enough should also be overruled.

### I. DOCUMENTS

Having concluded that defendants' general objections mentioned above are not valid, it is recommended that with respect to plaintiffs' motion for production of documents the same be granted as to each and every item.

Where not specifically designated in any individual document request, it is recommended that the time period covered should be January 1, 1970, to the present. With respect to the documents referred to in Requests Nos. 1 and 7, a Protective Order should be entered, reciting that no central file of any plaintiff and no personnel file of any member of the Adult Authority, hearing representative, or executive officer shall be shown to any person except counsel for the

plaintiffs and those personnel employed in their offices, and then only to the extent necessary to the conduct of this litigation, except as may be permitted by further order of the Court.

## II. INTERROGATORIES

It is recommended that plaintiffs' motion be granted as to Nos. 1 and 4; and denied as to Interrogatory 3 for each of eight defendant members of the Adult Authority. It it recommended that defendant Spangler answer Interrogatory No. 2.

It is further recommended that the plaintiffs' motion as to defendant Hoover be granted with respect to Interrogatories Nos. 12, 14, 16(b), 18, 20, 27, 31 and 38; and denied as to Nos. 15, 19 and 39.

Interrogatories Nos. 3 and 39 are covered by document requests, No. 19 requires no further answer, and No. 15 would require the Adult Authority Panel members to recall what the panel members said to the inmate and what the inmate said to them at diverse dates in 1972 and 1973 when the Adult Authority took action with respect to the named plaintiffs. That would be an undue burden upon the panel members. As to this particular interrogatory, the defense objection is well taken. Reference to plaintiffs' files and other documents as to which the motion is granted will suffice.

It is recommended that the plaintiffs' motion in respect to the Defendant Gordon be granted as to Interrogatories Nos. 14, 16, 17, 18, 27 and 41(b); and denied as to Nos. 15 and 39.



As to the Defendant Lynum, it is recommended that the motion be granted as to No. 27, and denied as to Nos. 39 and 41(b)39.

As to the Defendant Lopez, the motion should be granted as to Nos. 14, 27, 31, 34 and 35; and denied as to Nos. 38, 39, and 41(a)39.

As to the Defendant Edman, the motion should be granted as to Nos. 27 and 31; and denied as to Nos. 38, 39, 41(a)39, 41(c)9 and 41(d)39.

As to the Defendant Brown, the motion should be granted as to Nos. 14, 17, 27 and 41(d); and denied as to Nos. 19 and 39.

With respect to the Defendant Procunier, it is recommended that the motion be granted as to Nos. 12 and 14, and denied as to Nos. 10, 11 and 39.

As to the Defendant Spangler, it is recommended that the motion be granted as to Nos. 12, 14, 16, 17, 20, 21 through 38, and 41; and denied as to Nos. 10, 11, 13, 15 and 39.

Although Nos. 10 and 11 regarding Procunier and Spangler are relevant inquiries, it appears that plaintiffs will obtain the information through the granting of their motion for production of documents.

Finally, it is recommended that defendant pay to plaintiffs the sum of $500.00 as the expenses reasonably incurred by plaintiff in obtaining this order.

Dated: April 24, 1974

/s/ David R. Urdan
David R. Urdan
United States Magistrate

CERTIFICATE OF SERVICE BY MAIL

I Hereby Certify that copies of the foregoing Findings and Recommendations in Case No. C-72-2088SAW were this date mailed to the following:

B. E. Bergesen, III, Esq.
Attorney at Law
795 Turk Street
San Francisco, CA 94102

Fay Stender, Esq.
Attorney at Law
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Sidney M. Wolinsky, Esq.
Attorney at Law
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Attorneys for Plaintiffs;

William D. Stein, Esq.
Deputy Attorney General
Office of the Attorney General
6000 State Building
San Francisco, CA 94102
Attorney for Defendants.

Dated: April 24, 1974.

/s/ David R. Urdan
David R. Urdan
United States Magistrate



**Exhibit C**

United States Court of Appeals
for the Ninth Circuit

No. 74-3392

Henry R. Kerr, et al., Petitioners,

vs.

United States District Court, Northern District of California, Respondent,

John Van Geldern, et al., Real Parties in Interest.

[Filed Dec. 18, 1974]

ORDER

Before: MERRILL and DUNIWAY, Circuit Judges

The petition for writ of mandamus or prohibition and application for stay of discovery order, filed on December 13, 1974, is denied. The stay ordered by Judge Duniway on December 13, 1974, is vacated.

/s/ Charles M. Merrill
/s/ Ben. C. Duniway
United States Circuit Judges

United States Court of Appeal
for the Ninth Circuit

No. 74-3392

Henry R. Kerr, et al.,
Petitioners,
vs.
United States District Court, Northern District of California,
Respondent,
John Van Geldern, et al.,
Real Parties in Interest.

[Filed Dec. 13, 1974]

ORDER

Before: DUNIWAY, Circuit Judge

The order of the district court made December 3, 1974 is hereby stayed pending further consideration of the pending petition for writ of mandamus.

/s/ Ben. C. Duniway
U. S. Circiut Judge



**Exhibit D**

In the United States District Court
Northern District of California

Civ. No. 72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,
vs.
Henry W. Kerr, et al.,
Defendants.

[Filed Dec. 3, 1974]

ORDER

The plaintiffs have moved for enforcement of this Court's Order dated August 12, 1974, for sanctions and for clarification of said Order. Defendants have countermoved for sanctions and other relief.

The motions having duly come on for hearing, all parties having been heard, and good cause appearing therefor,

It Is Hereby Ordered that the Order of this Court dated August 12, 1974, is incorporated by reference into this Order.

It Is Hereby Ordered that the central files made available to plaintiffs in accordance with the Order dated August 12, 1974, shall include any and all mate-

rial, wherever located, which is available to or could be available upon request to Adult Authority members or hearing representatives in making parole determinations. The term "central files" shall include all files of a prisoner in the California Prison System, however designated, including but not limited to, "investigative files," "admininstrative files," or any similar designations. All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection.

It Is Further Ordered that all material previously removed or withheld by defendants from files already requested by plaintiffs shall be made available to plaintiffs' counsel for inspection within ten days.

It Is Further Ordered that plaintiffs, in their inspection of central files, may be assisted by no more than two persons (other than plaintiffs' attorneys) who shall be supervised by plaintiffs' attorneys, and who shall be certified law students in good standing in California law schools, or members in good standing with the State Bar of California.

Such persons shall be permitted physically to inspect all of the files made available to plaintiffs' counsel under this Order and the Order dated August 12th, 1974.

It Is Further Ordered that inspection of central files shall take place under such conditions as to provide a reasonable opportunity for plaintiffs' counsel and their designated assistants, to carry out their inspection in a businesslike manner during normal working hours.



It Is Further Ordered that plaintiffs' counsel, including any assistants, shall not alter, add to or destroy any file or any part thereof.

It Is Further Ordered that the tape recordings of parole consideration hearings provided for by the Order of this Court dated August 12th, 1974, continue unobstructed, and that such recordings include any and all utterances of hearing officers or other prison officials present before, during and after the time the inmate enters the hearing room.

It Is Further Ordered in reference to the Order of this Court dated August 12th, 1974 that:

1. Defendants shall make available to plaintiffs, upon plaintiffs' request, the central file of any inmate within the California Prison System, whether or not hearings have been tape recorded for such inmate, up to a maximum of 200 such files. Files previously made available shall be counted toward the maximum.

2. Plaintiffs, at their sole expense, may photocopy any or all of the said 200 files and any part of any or all of such files, provided they obtain written permission to do so in advance, from each inmate subject of such files. Before giving permission to photocopy, each such inmate shall receive a written notice from plaintiffs describing, in reasonable detail, the identities and num-

bers of persons who may have access to the photocopies sought by plaintiffs and the plaintiffs' proposed eventual disposition of the photocopies.

3. Plaintiffs' attorneys shall not make any use of said photocopies nor permit inspection thereof, except as necessary for acquittal of their duties of representation in this case.

4. Plaintiffs' attorneys are charged with protecting the confidentiality of the contents of all the files or parts of files inspected and/or copied by them and/or their assistants.

It Is Further Ordered that those portions of the record in this proceeding which contain transcripts or partial transcripts of inmate hearings in which the identity of the subject inmate or any other inmate or former inmate is revealed shall be immediately sealed and such portions shall be open for inspection only by further order of this Court. The responsibility for effecting sealing is placed upon counsel for plaintiffs.

Dated: 12/3/74

/s/ Stanley A. Weigel
United States District Court Judge



In the United States District for
the Northern District of California

Civil No. C-72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,

vs.

Henry W. Kerr, et al.,
Defendants.

[Filed Aug. 12, 1974]

ORDER

This Motion on July 18, 1974, came on to be heard on both plaintiffs' and defendants' request for review of Magistrate's Findings and Recommendations of June 11, 1974. Having heard argument by counsel for all parties and having considered all the records and files in this case,

It Is Ordered that the Magistrate's Findings and Recommendations dated June 11, 1974, and consisting of seven pages is incorporated by reference into this Order.

All counsel have agreed that the issue concerning attorney attendance at Adult Authority hearings has been resolved by mutual agreement of the parties and that it is therefore unnecessary for the Court to rule on this question.

It Is Further Ordered that the Findings and Recommendations of June 11, 1974, of the Magistrate are affirmed in part and overruled in part as specified in the remaining paragraphs of this Order.

It Is Further Ordered that the recommendation of the Magistrate concerning tape recording of Adult Authority hearings is overruled. California Adult Authority Parole Grant or Denial Hearings at both San Quentin and California Medical Facility located at Vacaville (hereinafter "Vacaville"), whether conducted by Adult Authority members of Hearing Representatives, shall be recorded, except as hereinafter provided, in their entirety pending further order of this Court. Said recording shall commence for all hearings taking place on or after August 5, 1974, and shall terminate two weeks prior to the date set for commencement of trial of this cause. Defendants shall promptly notify plaintiffs' counsel of the time and place of all scheduled parole grant or denial hearings at San Quentin and Vacaville from August 5, 1974, until two weeks prior to trial. Plaintiff's counsel shall then furnish to defendants' counsel, at least two days prior to the commencement of any hearing to be recorded, all necessary machinery to accomplish the tape recordings. The plaintiffs' counsel shall also furnish to defendants' counsel all necessary cassettes or tapes to comply with this Order. Plaintiffs shall be responsible for operating said tape recorder and shall see to it that all aspects of hearings are recorded, including all deliberations and conversations between and among panel members relating to the hearings even when prisoners are not physically present at the hearings.



Defendants shall cooperate to enable plaintiffs to comply with their obligations under this Order.

It Is Further Ordered that no party or other person shall alter, delete or destroy any tape, or any part thereof. Plaintiffs' counsel shall be responsible for assuring that defendants' counsel have equal access to any tapes within the possession or control of plaintiffs' counsel. Access to said tapes shall be restricted to counsel and their assistants and consultants.

It Is Further Ordered that prisoners who are participating in hearings shall have the option not to have their hearing recorded and they shall be advised of such right by supplying to them, prior to their hearing, a written notice in the form of Exhibit "A" to this order, which is hereby incorporated by reference.

It Is Further Ordered that with respect to the requested inspection of inmate central files the Magistrate's Findings and Recommendations are affirmed and modified as follows:

(a) Such inspection shall be carried out by plaintiffs' counsel and not by law students.

(b) Plaintiffs' counsel shall be permitted to select for their inspection the central files of those inmates whose hearings have been tape recorded in accordance with this Court Order (up to a maximum of 200 such files) and who have not objected to such inspection.

(c) For purposes of this Order the term "central files" shall be deemed to mean all of those files, wherever located, pertaining to an

inmate which are normally available to and considered by panel members and those actually used by panel members making a parole granting or denial determination.

(d) Defendants shall make such files available to plaintiffs' counsel during normal business hours at the offices of the Adult Authority at the Ferry Building in San Francisco.

It Is Further Ordered that defendants shall not be required to pay to plaintiffs attorneys fees or other expenses incurred in obtaining this Order.

Dated: Aug. 12th, 1971

/s/ Stanley A. Weigel
Judge, United States District Court

NOTICE OF RECORDING OF HEARING
AND NOTICE OF INSPECTING OF FILE

1. *Recording of Hearing*

A United States District Court Order requires that parole consideration hearings at San Quentin and Vacaville be tape recorded, but provides that any inmate may object to his hearing being recorded, and provides that the hearing may not be recorded if such an objection is made.

If your hearing is recorded, the attorneys for plaintiffs in the case may wish to inspect your central file. The plaintiffs are California state prisoners in prison and on parole. The defendants are the Directors of Corrections and the Adult Authority.

If you do not object, a tape recording will be made of your hearing and will be available to the attorneys



for both sides and to the Judge in a civil rights case. The recordings may be used as evidence to inform the federal judge of what happens at California parole consideration hearings.

If you do object, your hearing will not be recorded.

You should indicate by writing your initials in one of the boxes below whether you object, or do not object to your hearing being recorded.

☐ I *do not object* to my hearing being tape recorded.

☐ I *object* to my hearing being tape recorded.

Date: .....

.....
Inmate

2. *Inspection of Your File*

You should indicate whether you consent or do not consent by writing your initials in one of the boxes below.

☐ I *do consent* to plaintiffs' attorneys inspecting my central file.

☐ I *do not consent* to plaintiffs' attorneys inspecting my central file.

.....
Inmate

[This form should be given without comment by custodial officers or other personnel to each prisoner at San Quentin and Vacaville who will have a parole hearing between August 5, 1974, and November 15, 1974.]

In the United States District Court
for the Northern District of California

No. C-72-2088 SAW

John Van Geldern, et al., Plaintiffs,

vs.

Henry W. Kerr, et al., Defendants.

[Filed Jun 11, 1974]

## FINDINGS AND RECOMMENDATIONS

The Plaintiffs' Motion for an Order Compelling Discovery pursuant to Rule 37, Federal Rules of Civil Procedure, was heard June 5, 1974, and was submitted after hearing argument of counsel and upon all files and records in the case. The plaintiffs seek three items in their motion: first, that members in good standing of the California Bar be allowed to attend Adult Authority parole granting hearings on 24-hours notice; second, that defendants tape record all Adult Authority parole granting hearings until trial commences in this case; and third, that plaintiffs' counsel be permitted to inspect at random every twentieth file of inmates confined in the California prison system, and for whom a central file is kept. The plaintiffs have previously served upon the defendants a written request for these three items, and the defendants have denied each request in writing.



The constitutionality of the decision-making process of the Adult Authority with respect to fixing of sentence or the granting of parole is the basic issue in the case. Since the plaintiffs allege that the proceedings of the Adult Authority leading to a determination as to whether inmates in the California prison system are to be confined or released do not meet due process requirements, it is critical to aid the Court in making a determination as to the constitutionality of the procedures that the plaintiffs be permitted to develop facts and information through the federal rules discovery process, as to what transpires at such a hearing, and also to examine the central files of inmates other than the named plaintiffs.

### I. *Attending Adult Authority Hearings*

The Adult Authority issued Policy Statement No. 3 (Statement) April 24, 1967, which sets forth the rules to be followed at Adult Authority hearings. In pertinent part the Statement provides that certain persons might be invited to the hearings as official guests including, for example, legislators, judges, law enforcement officials, members of the press, but the Statement does not include members of the Bar or attorneys for the inmates. Invited guests are not permitted to take notes, no more than three visitors may observe any hearing, no person may appear in opposition to or as an advocate for any particular inmate,

no one may visit a parole hearing case who may have a personal interest in the inmate, no visitors are permitted where the inmate objects, and care is taken not to schedule visitors on the last day of the hearings. The Classification and Parole Representative at each institution is responsible for scheduling visitors at Adult Authority hearings.

Two things appear evident: first, the defendants completely control access to Adult Authority hearings that are the subject matter of the litigation; second, the procedure followed at these hearings is relevant and material to the subject matter of the case. The Federal Courts have allowed discovery by means of observation and have ordered the production of tape recordings and transcripts in certain cases. (See citations in Plaintiffs' Memorandum in Support of Motion.) Although the defendants seem to be willing, as expressed at the hearing and in their opposition papers, to reach an accommodation on this issue, they nevertheless argue that the issue of whether attorneys shall be allowed to observe Adult Authority hearings requires a determination by a three-judge Court that certain of the provisions in the Statement are invalid and inoperable.

The Statement cannot prevent relevant discovery under the Federal Rules of Civil Procedure and defendants' notion that a three-judge Court is required to rule on the question of whether plaintiffs should be permitted to attend the hearings in face of the Statement is without merit. The Statement is not a state statute or an order made by an administrative



board acting under a state statute within the meaning of 28 U.S.C. 2281 so as to require a three-judge Federal Court to pass upon its force and effect in this case.

The defendants argue further that many other avenues of discovery are open to the plaintiffs without the necessity of permitting counsel for plaintiffs to attend the hearings; for example, deposing Adult Authority members; deposing or calling inmates who have appeared at the hearings as witnesses; and inquiring of the defendants as to Adult Authority hearing procedures by means of interrogatories. The question, however, so far as plaintiffs' motion is concerned, and so far as the right to undertake discovery in general is concerned, is not what is necessary but what is permitted under the rules. What goes on at the hearings is relevant to the subject of the litigation, and once relevance is established the federal civil discovery rules are to be liberally construed. Parties may obtain discovery regarding any matter not privileged which is relevant to the subject matter involved in the pending action, and may undertake to seek information reasonably calculated to lead to the discovery of admissible evidence, and, parties may obtain discovery by permission to enter upon land or other property for inspection and or other purposes. Rule 26(a), Federal Rules of Civil Procedure. Also, the Court can make any order which justice requires to protect a party or person, including that the discovery may be had only on specified terms and conditions. Rule 26(c), Federal Rules of Civil Procedure. It is my

view that those two provisions of Rule 26 should be jointly applied to allow members of the Bar to attend Adult Authority hearings. In balancing the degree of necessity for disclosure shown by the private litigants here against the State's claim of importance of maintaining the "secrecy" of the hearings as expressed in the Statement, it is my view that plaintiffs' position is more compelling.

I do not believe plaintiffs' motion on this item should be granted in the form requested, but would recommend it be granted as follows:

The discovery cut-off date in the case is now set at August 15, 1974. The defendants' attorneys should arrange with the Classification and Parole Representative (the person listed in the Statement as being responsible for scheduling visitors at Adult Authority hearings) for three members of the California Bar to attend at least 15 Adult Authority hearings between now and August 15, 1974; that counsel for plaintiffs be included with respect to at least one-half of the visits so scheduled and that these attorney visitors be allowed to take hand-written notes of the proceedings.

### II. *Tape Recording*

It is my recommendation that this portion of the plaintiffs' motion be denied. The mechanics of tape recording and the intrusion of such a system upon the need for preserving the unfettered conduct of the hearings and free expression by inmates and Adult Authority members outweighs the utility and necessity of providing plaintiffs with this discovery vehicle. Furthermore, attendance at hearings provided in Part I of these Findings is a fair substitute for recording as well as providing plaintiff with access to the hearings.



### III. *Inmates' Files*

Plaintiffs seek to have defendant produce every twentieth file of inmates in California prisons. This would amount to about 1,000 files.

The files of the seven-named plaintiffs have been produced. Defendants object to producing files of inmates other than named plaintiffs. They argue that no decided California case requires it; that to do so would violate confidentiality provisions of California statutes and further, that such disclosure would, perhaps, be detrimental to institutional security, reveal informants who have a right to be protected and would inhibit public officials and private individuals from coming forth with information concerning inmates.

In cases arising under federal law it is clear that there is no constitutional inhibition to abrogation of state-created privileges in connection with pre-trial discovery. There is no absolute California State privilege that would prevent pre-trial discovery of inmate files. And further, there is no specific federal statute dealing with evidentiary privileges applicable to this case. The standard to be applied is not state case law or state statutes, but whether the confidentiality of files outweighs the plaintiffs' right to acquire material

relevant to the case. The answer is to grant discovery within the confines of a protective order contemplated by the rules.

There is the concept that the public interest may be a reason for not permitting inquiry into particular matters by discovery. However, in this case that interest is less critical that plaintiffs' right to utilize the discovery process, under certain limits, to examine inmate files where the contents are or may be central to the allegations made; namely, that the Adult Authority decision to release or confine an inmate is based in whole or in part on the information contained therein.

From all that appears in the files of this case and from all I have heard at discovery motion hearings, the conduct of the Adult Authority hearings and the manner in which they are held together with information in inmate files are, perhaps, the most relevant matters that might tend to support the plaintiffs' claims, are directly relevant and material to the subject of the litigation and are discoverable.

I would recommend that this item of the plaintiffs' motion be granted. However, the number of files to be produced should be limited to 200 and produced within 20 days subject to a protective order that would restrict examination and inspection of inmate files to attorneys for plaintiffs and for their use only in connection with this lawsuit.

Plaintiffs also seek $950 as sanctions against defendants for bringing this motion. I would deny plaintiffs that amount or any other sums. These requests here,



as distinguished from other previous motions, are rather unique. Defendants' failure to comply with plaintiffs' original requests for this information was not unreasonable as to now award plaintiffs any attorneys' fees.

Dated: June 11, 1974.

/s/ David R. Urdan
David R. Urdan
United States Magistrate

CERTIFICATE OF SERVICE BY MAIL

I Hereby Certify that copies of the foregoing Findings and Recommendations in Case No. C-72-2088 SAW were this date mailed to the following:

B. E. Bergesen, III, Esq.
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Attorneys for Defendants.

Dated: June 11, 1974.

/s/ David R. Urdan
David R. Urdan
United States Magistrate

Supreme Court, U. S.
FILED
JUL 25 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1974

## No. 74-1023

HENRY W. KERR, et al., *Petitioners*,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent*,

JOHN VAN GELDERN, et al., *Real Parties in Interest*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

**Petition for Writ of Certiorari filed February 15, 1975**
**Certiorari granted May 27, 1975**

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## APPENDIX

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1974

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

**CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES**

November 15, 1972 (USDC)—Plaintiffs' complaint for declaratory and injunctive relief filed in the United States District Court for the Northern District of California.

December 26, 1972 (USDC)—Defendants' motion to dismiss filed.

February 13, 1973 (USDC)—Plaintiffs' opposition to defendants' motion to dismiss filed.

March 1, 1973 (USDC)—Defendants' response to plaintiffs' opposition to defendants' motion to dismiss filed.

March 8, 1973 (USDC)—Order denying defendants' motion to dismiss filed.

March 19, 1973 (USDC)—Defendants' motion to amend Order denying motion to dismiss certifying questions for interlocutory appeal filed.

April 2, 1973 (USDC)—Plaintiffs' opposition to defendants' motion to amend Order certifying question for interlocutory appeal filed.

April 13, 1973 (USDC)—Order denying defendants' motion to amend Order to certify an interlocutory appeal filed.

May 15, 1973 (USDC)—Copy of Order of United States Court of Appeals for the Ninth Circuit (No. 73-1761) denying defendants' petition for writ of mandamus or prohibition filed.

June 1, 1973 (USDC)—Copy of Order of United States Court of Appeals for the Ninth Circuit (No. 73-1761) denying defendants' petition for rehearing filed.



June 21, 1973 (USDC)—Plaintiffs' request for production of documents filed.

November 30, 1973 (USDC)—Defendants' answer to plaintiffs' request for production of documents filed.

March 11, 1974 (USDC)—Plaintiffs' motion to compel further answers to interrogatories and production of documents filed.

March 25, 1974 (USDC)—Defendants' opposition to plaintiffs' motion for an order compelling further answers to interrogatories and further production of documents filed.

April 1, 1974 (USDC)—Plaintiffs' reply to defendants' opposition to plaintiffs' motion for order compelling further discovery filed.

April 24, 1974 (USDC)—Magistrate's Findings and Recommendations on plaintiffs' motion for order compelling further discovery filed.

April 30, 1974 (USDC)—Defendants' notice of intent to review magistrate's decision and statement of objections filed.

May 6, 1974 (USDC)—Defendants' request for review of magistrate's decision filed.

May 15, 1974 (USDC)—Plaintiffs' motion to compel further discovery filed.

June 3, 1974 (USDC)—Defendants' response in opposition to plaintiffs' motion to compel further discovery filed.

June 5, 1974 (USDC)—Plaintiffs' memorandum in support of opposition to defendants' request for review of magistrate's decision filed.

June 11, 1974 (USDC)—Magistrate's Findings and Recommendations filed.

June 17, 1974 (USDC)—Plaintiffs' request for documents filed.

June 17, 1974 (USDC)—Defendants' notice of intent to review magistrate's decision and statement of objections filed.

June 20, 1974 (USDC)—Order adopting magistrate's Findings and Recommendations, except for modifications as noted, filed.

June 24, 1974 (USDC)—Plaintiffs' request for review of magistrate's decision filed.

June 26, 1974 (USDC)—Plaintiffs' motion to compel production of documents filed.

June 26, 1974 (USDC)—Plaintiffs' amendment to complaint filed.

June 26, 1974 (USCA, No. 74-2206)—Petition for writ of mandamus or prohibition and application for stay filed.

July 15, 1974 (USDC)—Defendants' response to plaintiffs' motion to compel further discovery filed.

July 16, 1974 (USCA, No. 74-2206)—Petitioners' letter of additional authorities received.

July 19, 1974 (USCA, No. 74-2206)—Letter of real party in interest responding to letter of petitioner dated July 16, 1974 received.



July 23, 1974 (USDC)—Defendants' answer to complaint as amended filed.

August 8, 1974 (USCA, No. 74-2206)—Petitioners' supplemental application for stay filed.

August 12, 1974 (USDC)—Order affirming magistrate's Findings and Recommendations of June 11, 1974, filed.

August 15, 1974 (USCA, No. 74-2206)—Order requiring an answer to petition for mandamus and application for stay filed.

August 23, 1974 (USDC)—Order determining that action may be maintained as a class action filed.

August 30, 1974 (USCA, No. 74-2206)—Answer of real party in interest to petition for mandamus filed.

September 4, 1974 (USCA, No. 74-2206)—Petitioners' reply to answer of real party in interest filed.

September 20, 1974 (USCA, No. 74-2206)—Order continuing stay and calendaring matter for argument on November 14, 1974, filed.

October 21, 1974 (USDC)—Plaintiffs' motion for enforcement, clarification, and sanctions filed.

October 24, 1974 (USDC)—Defendants' opposition to plaintiffs' motion for enforcement, clarification, and sanctions filed.

October 29, 1974 (USDC)—Plaintiffs' response to defendants' opposition to plaintiffs' motion for enforcement, clarification and sanctions filed.

October 30, 1974 (USCA, No. 74-2206)—Petitioners' letter of additional authorities filed.

October 31, 1974 (USDC)—Defendants' reply to plaintiffs' response to defendants' opposition to plaintiffs' motion for enforcement, clarification, and sanctions filed.

November 11, 1974 (USDC)—Plaintiffs' motion for modification of Order of August 12, 1974, filed.

November 14, 1974 (USCA, No. 74-2206)—Petition for writ of mandamus argued and submitted.

November 20, 1974 (USDC)—Defendants' response to plaintiffs' motion for modification of Order of August 12, 1974, filed.

December 3, 1974 (USDC)—Order for clarification and enforcement of Order of August 12, 1974, filed.

December 13, 1974 (USCA, No. 74-3392)—Petition for writ of mandamus, application for stay, application for immediate stay filed.

December 16, 1974 (USCA, No. 74-3392)—Letter of respondent (real party in interest) in opposition to petition for mandamus received.

December 18, 1974 (USCA, No. 74-3392)—Order denying petition for mandamus and vacating stay filed.

January 6, 1975 (USDC; USCA, No. 74-3392)—Order of USSC, Mr. Justice Douglas, staying USDC order of December 3, 1974, received.[1]

[1]This entry, and the entry of February 6, 1975, are made in the Court of Appeals Docket in No. 74-2206. This, however, appears to be a clerical error as the district court's order of December 3, 1974, was before the Court of Appeals only in No. 74-3392 and not in No. 74-2206.



January 17, 1975 (USCA, No. 74-2206)—Opinion denying mandamus and vacating stay filed.

January 22, 1975 (USCA, No. 74-2206)—Petitioners' application for stay of mandate pending the filing and disposition of a petition for writ of certiorari filed.

January 27, 1975 (USCA, No. 74-2206)—Respondents' (real party in interest) opposition to petitioners' motion for stay filed.

January 27, 1975 (USCA, No. 74-2206)—Order staying mandate to February 17, 1975, pending the filing and disposition of a petition for writ of certiorari filed.

February 6, 1975 (USDC; USCA, No. 74-3392)—Order of USSC, Mr. Justice Douglas, continuing the stay of the USDC order of December 3, 1974, pending the filing and disposition of a petition for writ of certiorari received.[2]

February 12, 1975 (USCA, No. 74-2206)—Petitioners' motion to extend stay of mandate filed.

February 13, 1975 (USCA, No. 74-2206)—Order staying mandate to February 28, 1975, and pending disposition of a timely filed petition for writ of certiorari filed.

February 15, 1975 (USSC, No. 74-1023)—Petition for writ of certiorari filed.

May 27, 1975 (USSC, No. 74-1023)—Order granting petition for writ of certiorari.

[2]See footnote 1, supra.

[Designation of Attorneys for Plaintiffs Omitted in Printing]

In the United States District Court
for the Northern District of California

C-72-2088 SAW

John Van Geldern, Danny Jones, Charles Edward Van Nort, Billy Ray Lewis, Robert Newton Gardner, Jr., James Murrin, George Chatfield, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Henry W. Kerr, Curtis O. Lynum, Walter A. Gordon, Jr., Manley J. Bowler, Leland M. Edman, James H. Hoover, Charles E. Brown, Daniel R. Lopez, individually and in their official capacities as members of the California Adult Authority, Joseph A. Spangler, individually and in his official capacity as Administrative officer of the California Adult Authority, Raymond K. Procunier, individually and in his official capacity as Director of Corrections of the State of California; their agents, employees, and successors in interest,

Defendants.

[Filed Nov. 15, 1972]

COMPLAINT FOR VIOLATION OF CIVIL RIGHTS, FOR DECLARATORY AND INJUNCTIVE RELIEF



*Jurisdiction*

1. This is a civil action brought by plaintiffs on behalf of themselves and all others similarly situated under Section 1343 of Title 28 of the United States Code, to redress the deprivation of rights, privileges and immunities secured to them by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Pursuant to 42 U.S.C. Sections 1983 and 1988 and 28 U.S.C. Sections 2201 and 2202, plaintiffs seek declaratory and injunctive relief to remedy the unconstitutional conduct of defendants complained of herein.

*Nature of the Case*

2.a. Plaintiffs and their classes are inmates in various California state prisons. They challenge the hearing procedures whereby defendants, members of the California Adult Authority and the Department of Corrections, grant, deny, or rescind parole, fix and re-fix sentences, and whereby they purport to adjudicate infractions of prison rules. Because these decisions involve fundamental rights of liberty and result in grievous loss for thousands of California prisoners by depriving them of that liberty, the process of making these decisions must meet the due process requirements of the Fourteenth Amendment.

b. The statutory and decisional law of California forbids these decisions to be made in an arbitrary manner or in the absence of "good cause". Therefore the Adult Authority and the Department of Corrections, pursuant to constitutional and statutory grants

of power, have established hearing procedures at which hearings these decisions are made. Where, as here, such hearings are required to be held by both Federal and State law, they must be fair and impartial in the constitutional sense, as is more fully described below.

c. The hearing procedures actually followed by defendant members and administrative officers of the Adult Authority and by the Department of Corrections are in fact completely lacking in both procedural and substantive due process, and in rudimentary fairness or equity. Hearings held by the Adult Authority are defective in that:

(1) Inmates who are to appear before panels of members or representatives of the Adult Authority, are not informed as to the material the panel has before it and are absolutely prohibited from reviewing their central file, upon which the Authority will in large part base its decision;

(2) Inmates are absolutely prohibited from being represented by retained counsel, nor is counsel ever appointed at the request of an indigent;

(3) Hearings average about ten minutes, although the median time is considerably less. Decisions are made in less than five minutes, and without any extended or meaningful discussion of the case;

(4) No written statements of the reasons for decisions or of the evidence relied on are provided the inmate;



(5) As more fully alleged in paragraph 16 petitioners allege that Adult Authority members have no expertise, are biased, and base their decisions on false, inaccurate, and misleading information.

d. Hearings are also conducted by the Department of Corrections. These hearings purport to adjudicate infractions of prison rules. Consequent to such adjudications prisoners may be punished by transfer, assignment to solitary confinement, permanent reclassification to maximum security sections, and may suffer other loss of the restricted liberty which is available to the general prison population. Reports concerning these alleged infractions are placed in the files of plaintiffs and their class, and said material is reviewed by the Adult Authority, and is often used to deny or rescind parole.

e. The hearing procedures employed by Defendant Procunier and the Department of Corrections and the Adult Authority in their said hearings are constitutionally infirm because they are not designed to be nor are they effective to expose and develop the critical facts upon which the Department of Corrections and the Adult Authority's decisions must be made, or to apply to such facts the appropriate criteria in order to reach a rational and correct decision as a matter of law. As a direct result of these defective procedures, the decisions routinely reached by the Department of Corrections and the Adult Authority are so arbitrary, discriminatory and otherwise illegal as to violate plaintiffs' rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

f. The combined procedures of the Department of Corrections and the Adult Authority result not in a correctional system, but in a chaotic limbo where prisoners, including plaintiffs and their class, must spend unknowable and unlimited numbers of years of imprisonment soliciting the favor and humoring the impulse, whim, caprice, and mood of correctional staff, Adult Authority members and representatives, and parole officers. False, biased, prejudicial, and distorted allegations from inmates, associates on the outside during parole periods, correctional staff, unqualified medical assistants, and others, are accumulated in the prisoners' central files and accorded weight impossible to measure or ascertain in the decisions of the Adult Authority and the Department of Corrections.

g. Accordingly, plaintiffs seek declaratory and injunctive relief to require that defendants henceforth afford plaintiffs and their class fundamental due process safeguards in the proceedings and hearings which determine the contents of the central files at which the Adult Authority fixes or refuses to fix the terms of sentences and grants or denies parole, rescinds or revokes parole, and at those hearings which are conducted to review adverse determinations within the administrative channels of the Adult Authority itself. The minimum due process safeguards to assure evidentiary integrity to these hearings and procedures include the right to:

1) receive timely notice of all alleged violations of parole or infractions of prison rules which may lead to the denying of sentence determination or parole, or the rescinding or revoking of parole;



2) conduct a timely review of the entire central file and all other documents which will be available to the Adult Authority or Department of Corrections in reaching their decisions;

3) adduce favorable evidence and cross-examine adverse witnesses and persons submitting adverse reports at disciplinary hearings and at Adult Authority hearings;

4) be represented by retained counsel at the hearings conducted by the Adult Authority, and be represented at disciplinary hearings in the manner detailed in the Opinion of the Court in *Clutchette v. Procunier,* in the order of June 21, 1971 (328 F. Supp. 767, Northern District of California);

5) be heard by an impartial and unbiased panel or official who has had no connection with any of the alleged violations or other operative facts, including the prisoners' original conviction or earlier revocations, upon which the Adult Authority's decision will turn. In this connection, a procedure is required, and must be evolved, which furnishes the name of the Adult Authority representatives or members who are scheduled to hear whatever type of hearing is pending in sufficient time to permit the prisoner to exercise an option to disqualify a representative or member for previous involvements with the prisoner's case, or for personal bias or prejudice from pre-

vious relationships with said representative or member;

6) be furnished with a verbatim transcript of the hearing, and be furnished with a written statement of the reason for an adverse determination, and the evidence upon which it was based;

7) be represented in person or by counsel at any additional appellate or administrative review proceedings conducted by the Adult Authority with due process procedures appropriate to a reviewing agency.

*Parties*

3. Plaintiffs John Van Geldgern,* Danny Jones, Charles Edward Van Nort, Billy Ray Lewis, and Robert Newton Gardner, Jr. are prisoners in the custody of the Department of Corrections of the State of California (hereinafter "The Department") presently confined at the California Men's Colony at San Luis Obispo (hereinafter "CMC"). Plaintiff James Murrin is a prisoner in the custody of the Department, presently confined at California Conservation Camp #5 at Marimonte, and previously at Sierra Conservation Center at Jamestown, California (hereinafter "Jamestown"). Plaintiff George Chatfield is a prisoner in the custody of the Department presently confined at California State Prison at San Quentin.

4. Plaintiffs bring this action as a class action, individually and on behalf of all others similarly

*No changes in spelling, syntax, punctuation, etc. have been made by printer.



situated. The class is divided into subclasses defined as follows:

*Class A*

All inmates in the custody of the Department who have had, or will have in the future, a term which was previously fixed and a parole date which was previously set by the Adult Authority rescinded by said Authority prior to the date on which said inmates would have been released on parole. Class A is represented by plaintiffs Jones, Van Nort, and Murrin.

*Class B*

All inmates in the custody of the Department who have had their parole revoked by the Authority pursuant to the procedures complained of herein, or will be subject to the revocation procedures of the Authority complained of herein. Class B is represented by plaintiffs Lewis, Gardner, Van Geldern, and Chatfield.

*Class C*

All inmates in the custody of the Department, whether they have been paroled or revoked or not, who appear before the Adult Authority for purposes of determining whether the Authority will fix or refuse to fix their terms and grant or deny them parole, pursuant to the procedures complained of herein. Class C is represented by all the named plaintiffs herein.

As to each subclass of persons, it is so numerous that the joinder of all members is impracticable; there are questions of law and fact common to the subclass; the claims of the named plaintiffs herein are typical of the claims of the subclass, and plaintiffs will fairly and adequately protect the interests of the other members of the subclass. In addition, the prosecution of separate actions by individual members of each subclass would create a risk of adjudications with respect to individual members thereof which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and, the parties opposing each subclass have acted and refused to act on grounds generally applicable to the subclass, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the subclass as a whole.

5. Defendants Henry W. Kerr, Curtis O. Lynum, Manley J. Bowler, Walter A. Gordon, Jr., Leland M. Edman, James H. Hoover, Charles E. Brown, and Daniel R. Lopez are members of the Adult Authority, and defendant Joseph A. Spangler is the administrative officer of the Adult Authority. In such capacities said defendants are responsible for designing and carrying out constitutional, lawful, and fair procedures to determine, *inter alia,* whether or not to:

A) fix an inmate's term and grant parole

B) rescind an earlier decision to fix an inmate's term and grant parole, prior to the date upon which he is actually released on parole



C) revoke an inmate's parole

D) review said proceedings and determinations upon request of an adversely affected inmate.

Defendant Spangler is responsible for the implementation of the responsibilities of the defendant members as hereinabove described. Defendant Spangler has in fact assisted in making policy, designing procedures, making de facto determinations critical to the decisions made by the Adult Authority, and in interpreting the laws under which the Adult Authority operates to deny plaintiffs and their classes and subclasses fundamental fairness and due process of law. Defendant Spangler is the chief staff officer and handles all administrative functions as delegated and determined by the Authority. He is the official keeper of the Authority's records, and liaison officer with defendant Procunier and the staff of the Department of Corrections.

6. Defendant Raymond K. Procunier is the Director of the Department and in such capacity is responsible for the overall operation of the Department, the promulgation and enforcement of rules governing the confinement of inmates subject to the custody of the Department, including the proceedings had on disciplinary charges, and the keeping of central files relied on by the Adult Authority in making the determinations described in paragraph 5, *supra,* and the safety of each such inmate.

7. Defendants are sued both individually and in their official capacities. In depriving plaintiffs of their constitutional rights, as set forth hereinafter,

defendants and each of them have acted and refused to act under color of the statutes, ordinances, regulations, customs and usages of the State of California.

*Facts*

8. *Introduction* As to the named plaintiffs, at all times herein mentioned defendant Adult Authority members and administrative officer and their agents, representatives and employees were routinely conducting parole consideration hearings, sentence fixing hearings, hearings or preceedings to determine whether or not to revoke or rescind parole, and hearings to impose serious disciplinary sanctions throughout the various institutions of the Department of Corrections in the State of California.

*Plaintiff Billy Ray Lewis*
*(representing subclasses B & C)*

9.a. In March of 1972 plaintiff Billy Ray Lewis was released on parole. His parole plan was based upon his working as a janitor in San Jose. Plaintiff commenced said employment, and approximately one month after his release married the woman to whom he had been engaged during his imprisonment. Shortly after their marriage plaintiff Lewis and his wife experienced a series of marital difficulties. Plaintiff and his wife quarreled frequently and on more than one occasion his wife threatened to have his parole violated without cause and solely so plaintiff would be returned to prison. Eventually, plaintiff moved out of their bedroom and because of their growing incompatibility ceased having sexual relations with his wife.



b. On or about October 18, 1971, plaintiff's wife locked the door to their house, barred plaintiff's entry thereto, and demanded that he return later in the day to gather his belongings and that he move out. When plaintiff returned he was arrested by the Police and charged with the crime against nature based on a complaint allegedly made by plaintiff's wife to his parole officer falsely accusing plaintiff of having sexual relations with a dog.

c. Plaintiff's wife denied and now denies having lodged such a complaint. Plaintiff is unaware whether his wife's denial of having lodged the charge is true or whether she in fact lodged the complaint pursuant to her earlier threats to cause his parole to be revoked. In either case, said charges were and are complete fabrications and totally false, and plaintiff's wife so informed the Santa Clara Public Defender who was appointed to represent plaintiff in court. All criminal charges against plaintiff were accordingly dismissed.

d. At all times relevant hereto, plaintiff did everything in his power to preserve a difficult and deteriorating personal relationship with his wife under adverse conditions caused by his wife's quarrelsome nature, by her obesity, and by her constant threats to revoke his parole.

e. Notwithstanding the above, and notwithstanding the fact that plaintiff's wife informed the Adult Authority that her alleged complaint was untrue, plaintiff was returned to prison and in December of that year appeared before the Adult Authority on parole violation charges which were based entirely

upon the same charge which had been dismissed by the court. At the hearing plaintiff was not permitted to rebut the charge against him, or to present any witnesses or other evidence to prove the falsity of the charges. Although plaintiff pled "not guilty" to the charge, the Adult Authority found him guilty, ordered that plaintiff undergo a psychiatric examination and obtain a "psych clearance" prior to his next parole hearing in May of 1972. Subsequently, plaintiff was duly examined and given a psychiatric clearance.

f. On or about April 26, 1972, plaintiff again appeared before the Adult Authority for parole consideration and sentence determination. On this occasion the Adult Authority refused to determine plaintiff's sentence or to release him on parole because of suspicion of sodomizing a dog and on a charge of "lewd behavior" and upon the further ground that he refused to admit that he was guilty. Again, plaintiff was denied the right to be represented by an attorney who was willing and able to appear in his behalf; and he was again denied the opportunity to present evidence or to rebut the false charges against him. At the hearing plaintiff was denied further parole consideration until November of 1972.

g. At each of the foregoing hearings before the Adult Authority the panel members acted upon information which was absolutely false, and which required sophisticated assessment and consideration of plaintiff's contentions. The Adult Authority revoked plaintiff's parole and thereafter refused to fix his term or grant him parole, all without good cause.



*Plaintiff Danny Jones*
*(representing subclasses A and C)*

10.a. In February of 1970, an Adult Authority panel which included defendant Lynum fixed two concurrent terms which plaintiff Danny Jones was then serving, set a parole release date of October 1, 1970, and assigned plaintiff Jones to the department's Work Furlough program. Certain agents, representatives and employees of defendant Procunier, constituting members of the Classification Committee at the California Institution for Men at Chino (hereinafter "Chino") where plaintiff Jones was then confined, opposed the work furlough assignment, and arranged to prevent Jones from being so assigned. Plaintiff Jones saw no way to appeal the Department's frustration of the assignment ordered by the Adult Authority other than purposefully incurring a disciplinary report in order to appear again before defendant Lynum. This plaintiff did, and when defendant Lynum learned of plaintiff's situation, he reversed the action of the said Classification Committee and insisted that plaintiff be assigned to the Work Furlough program. Thereafter, two of the said Committee members told plaintiff explicitly that any possible excuse would be seized upon by them to bring about the rescission of plaintiff's parole date.

b. Plaintiff Jones subsequently obtained a job and then a promotion with Carson Industries, a trailer manufacturer. Certain of defendant Procunier's agents, representatives and employees continued to plan actively to obtain rescission of plaintiff's parole date, and some made bets among themselves that he

would not be able to complete the program without having his parole date rescinded. Plaintiff Jones withstood the tensions and difficulties imposed by this continuing attitude, and made an excellent adjustment in the Work Furlough program and established a warm relationship with a woman his own age.

c. On or about September 26, 1970, only five days before plaintiff Jones was due to be released on parole, he returned to the prison quite tired from a hard day's work, and went to sleep at about 8:30 p.m. Several hours later, about four guards, agents, representatives and employees of defendant Procunier, went through plaintiff's wing and made their count on plaintiff's tier by loudly slamming the doors of the various cells. A few minutes later, the guards returned to plaintiff's cell and repeated the door banging routine, whereupon plaintiff, violently awakened from the beginnings of sleep, verbally protested this action to the guards involved. Although plaintiff's protest had been temperate and reasonable, the guards told him that they were going to lock him up for insubordination. Later, before the Watch Lieutenant, they altered their story to falsely charge plaintiff with threatening an officer. This Lieutenant listened to plaintiff's version of the incident and, noting that he had only five days to go before release on parole, told plaintiff to return to his cell and to continue his regular work schedule.

d. On or about September 29, 1970, upon returning to the institution from work, plaintiff was summarily placed in chains, taken to the Custody



Sergeant's office, and later placed in isolation, although no reason was given for this treatment. About 10 days later, several days after plaintiff was to have been released on parole, he was taken before a disciplinary committee composed of the same staff members who had opposed his participation in the Work Furlough program and charged with "threatening an officer" and "disobeying orders". About a week later, plaintiff appeared before two members of the Adult Authority for an interview which lasted less than 2 minutes. Three days later he received official notice that his parole date had been rescinded, and that he would be scheduled for an appearance before the Adult Authority in March of 1971, for further parole consideration. Petitioner was then transferred to Folsom Prison.

e. In March of 1971 petitioner appeared before the Adult Authority and received a new parole date of December 6, 1971. Although plaintiff opposed participation in the Work Furlough program, based upon his earlier experience, he was nonetheless transferred to said program, and to the same part of Chino where he had earlier had his difficulties with staff.

f. Upon entering the Work Furlough program, petitioner obtained employment with the same employer and once again, working and saving diligently, was able to establish credit, buy a car, and commence normal relationships with people on the outside world. However, about a month later plaintiff was summarily removed from the Work Furlough program pending

"investigation", which apparently continued for the next five days, whereupon plaintiff was told by staff that the investigation had "cleared" him and that he was being reinstated in the Work Furlough program. To this date plaintiff does not know what the reason for the "investigation" was. However, upon returning to his place of employment plaintiff's supervisor told him that he could not afford to hire people who would be arbitrarily suspended from the program for five days, as plaintiff had, and that he would therefore terminate plaintiff's employment and thereafter refrain from hiring any prisoners from the Work Furlough program. Approximately five days later plaintiff found part-time work cleaning up mobile homes.

g. Several months later, plaintiff was mistakenly arrested as a prowler, and was sentenced to serve 30 day in jail by a Municipal Court Judge in Corona for trespassing. On or about December 7, 1971, plaintiff was given a hearing before defendants Kerr and Edman, who told him that if they released him he would simply stick guns in people's face and burglarize, apparently referring to the trespassing incident (in which the police report of this incident clearly stated that plaintiff was not armed.) Shortly thereafter, plaintiff received notice that his parole date had been rescinded, his sentences redetermined, and his parole release date reset to June 5, 1972, conditioned upon plaintiff receiving no more disciplinary reports.

h. In February of 1972, a prison guard, an agent, representative and employee of defendant Procunier,



submitted a falsified disciplinary report concerning plaintiff, accusing him of an insubordinate attitude. As a result, plaintiff's case was referred back to the Adult Authority, which again rescinded his parole date and transferred him to CMC.

i. At CMC plaintiff Jones appeared before the Adult Authority in May of 1972, for a hearing which lasted approximately 90 seconds. At this hearing the Adult Authority declined to determine plaintiff's sentence or to grant parole, and scheduled his next hearing for December of 1972.

j. In none of the Adult Authority hearings referred to in this paragraph was plaintiff permitted to know the information upon which the panel members based their decision. During the last 4 such hearings the Adult Authority members had before them information which was in material part either false or misleading, yet plaintiff was not permitted to rebut this information by cross-examining the persons who had made the statements involved, nor was he permitted to present any evidence in his behalf. At none of the hearings was plaintiff permitted to be represented by counsel.

*Plaintiff Charles Edward Van Nort*
*(representing subclasses A & C)*

11.a. In May of 1967, plaintiff Charles Edward Van Nort was sentenced to a term of imprisonment for violation of California Penal Code § 245, which sentence was ordered to run concurrently with the unexpired time on a previous conviction. On or about May 20, 1970, plaintiff Charles Van Nort appeared

before the Adult Authority which fixed his terms and granted him a parole, to become effective on December 1, 1970. Shortly thereafter, plaintiff was assigned to the Work Furlough program at Chino, and began work at the Mayfair Market in Montclair, California.

b. On or about November 11, 1970, at approximately 5:45 a.m., several officers from the Montclair Police Department, together with several members of the Chino and/or parole office staff, approached plaintiff and placed him under arrest. Plaintiff immediately requested to be informed of the charge against him, but the arresting officials refused to supply this information. Plaintiff then requested the assistance of counsel and also permission to make a telephone call, but both requests were denied. Plaintiff was summarily taken into custody and returned to Chino, where he was placed in segregation and held incommunicado.

c. Plaintiff remained in segregation for approximately a week, during which time he was interrogated by a Mr. Smith, who refused to inform him of the charges against him, refused to afford him the opportunity to consult with counsel, or even to make a telephone call. Officials at Chino would tell him only that his "case" had been "referred to the Los Angeles District Attorney," leaving plaintiff to believe that he was being charged with a felony. Accordingly, he remained silent except for the numerous demands which he made for information concerning the charges against him and the assistance of counsel.

d. On or about November 20, 1970, having recently been released to the general population of the Reception Guidance Center at Chino, plaintiff was brought before a disciplinary committee of that prison and ordered to enter a "plea" to the "charge", although officials still refused to disclose the nature of said charge. Over plaintiff's objection, the hearing officer entered a plea of guilty as charged and entered a recommendation to the Adult Authority that plaintiff's parole date of December 1, 1970, be rescinded. In addition, plaintiff was forced to sign a document which purported to set forth the nature of his "offense".



e. On or about December 22, 1970, plaintiff appeared before an Adult Authority panel at which time his parole date was officially rescinded. At no time during the hearing was plaintiff allowed to see the report against him or to present evidence in his favor; instead, he was told only that the "incident" was under investigation by the Los Angeles County District Attorney. On or about January 11, 1971, plaintiff received official notification of the Adult Authority's action, and on or about January 19, 1971, plaintiff received official notification that he had been designated a "Special Interest Case" by the Adult Authority.

f. Since that time plaintiff has upon many occasions requested officials of the Adult Authority and the Department to inform him of the "crime" which he had allegedly committed, but on every occasion this information was either flatly refused or else plaintiff was told that the case was still being investigated by the Los Angeles County District Attorney. Subsequent to the rescinding of plaintiff's parole date, he

was twice appeared before the Adult Authority. On each occasion he has been denied parole solely on the grounds of the alleged "crime" which was the cause for rescinding his parole date in December of 1970.

g. Plaintiff has never been presented with a statement of the evidence or charges against him by defendants and has never been shown police reports or parole agent reports of said evidence or charges by defendants. It was not until May, 1972, in a Return filed by the Attorney General of the State of California to a Petition for a Writ of Habeas Corpus filed in California State Courts by Plaintiff, that Plaintiff ever learned the nature of the charges against him. The information contained in said Return is false and inaccurate and in fact does not indicate that any "crime" was committed by defendant *(sic)* while at liberty or that any crime formed the basis for his parole rescission. Rather, said information indicates that plaintiff is accused of having been absent from work for a few hours on an occasion when he was ill, and during a period when there was no requirement that he report hourly to the Work Furlough Center, and further that a bottle of whiskey allegedly belonging to plaintiff—but in fact belonging to his father—was found in plaintiff's automobile.

h. In none of the Adult Authority hearings referred to in this paragraph was plaintiff permitted to know the information upon which panel members based their decision. During all of the hearings commencing with the proceedings leading to rescission, the rescission itself, and the subsequent denials of parole, the Adult Authority members had before them



information which was in material part either false or misleading, yet plaintiff was not permitted to rebut this information by cross-examining the persons who had made the statements involved, nor was he permitted to present any evidence in his behalf other than to make a statement. At none of the hearings was plaintiff permitted to be represented by counsel. As a result of the rescission of his parole, plaintiff has been classified in a special category and required by the Adult Authority to complete a special program entitled "Stress Assessment Unit" before even becoming eligible for favorable parole consideration. Correctional staff members at CMC, informed plaintiff Van Nort in April of 1972 that he must dismiss all litigation concerning his parole rescission or be taken out of the said Stress Assessment Union, without participation in which he cannot be eligible for parole consideration. Challenging any action taken by correctional or Adult Authority staff is regarded as evidence of lack of rehabilitation, and the Stress Assessment Unit specializes in probings of acceptance of guilt and wrongdoing. Plaintiff is informed and believes and therefore alleges, that his parole has been denied since it was rescinded, in whole or in substantial part, because he has sought to challenge the proceedings and to obtain judicial review of them.

*Plaintiff Robert Newton Gardner, Jr. (representing subclasses B and C)*

12.a. In or about March of 1967 plaintiff Robert Newton Gardner, Jr. was released on parole, and his sentence, as fixed by the Adult Authority, was

scheduled to expire on or about March 18, 1960. On or about December 11, 1959, a hearing of which plaintiff was unaware, was held by the Adult Authority, at which time plaintiff's parole was suspended. On or about May 30, 1960, some 9 weeks subsequent to plaintiff's discharge date, his parole was revoked and he was returned to the custody of the Department.

b. On or about February 1, 1971, plaintiff was again released on parole. On or about March 17, 1971, plaintiff was arrested on charges of assault with a deadly weapon and possession of a firearm by an ex-felon. In September of 1971, plaintiff plead guilty to a violation of California Penal Code §245 (assault with force likely to produce great bodily injury), whereupon the trial judge reduced the offense to a misdemeanor and sentenced plaintiff to serve an amount of County Jail time equal to time which he had already served, for which credit was given, so that as of the date of sentencing plaintiff had no more time to serve on this charge. At the same time, the trial judge indicated that he believed the offense had arisen out of a family dispute.

c. Plaintiff's parole officer prepared a report concerning the foregoing incident. However, plaintiff is informed and believes and therefore alleges that said parole officer refused to return the calls of approximately 8 prospective witnesses who wished to give evidence on behalf of plaintiff, three of whom were attorneys who were knowledgeable about plaintiff's case. Said report was necessarily, therefore, incomplete, inadequate, and seriously distorted.



d. On or about November 19, 1971, the Adult Authority placed plaintiff in the STRU (Short Term Release Unit) Program, the effect of which is generally to make an inmate eligible for parole from 4 to 6 months thereafter. Subsequently, plaintiff appeared before an Adult Authority representative named Halderman, whom plaintiff had previously known when Halderman was serving at Folsom Prison, and with whom the plaintiff did not get alone. When plaintiff attempted to explain the circumstances surrounding his misdemeanor conviction, Halderman refused to listen, but instead referred to plaintiff as a "troublemaker" and recommended that plaintiff's parole be revoked and that he be removed from the STRU Program. On January 5, 1972, the Adult Authority, during an ex parte hearing, approved the recommendations of Halderman. Plaintiff was not permitted to be present at this meeting, nor was he allowed to be represented by any one of the three attorneys who had requested to appear in his behalf.

e. Plaintiff is informed and believes and therefore alleges that a parolee is normally removed from the STRU Program only for cause, that is, for a violation of the rules of the program. Plaintiff, however, had a good record in the STRU Program and was not removed therefrom for having violated any regulation of the Program; rather, plaintiff was removed from the Program without any good cause solely because the Adult Authority representative who presided over his case was personally biased and prejudiced against plaintiff.

f. All of the foregoing occurred without plaintiff ever being afforded the right to be heard and present a defense against the charges made, including the right to call witnesses in his own behalf, the right to confront and cross-examine the witnesses against him, the right to counsel, and the right to fair and timely notice of his alleged misconduct.

*Plaintiff John Van Geldern, (representing subclasses B and C)*

13.a. In October of 1967 plaintiff John Van Geldern was released on parole. In February of 1969, after being convicted of violating California Penal Code Sections 26104a, and 487, and California Corporations Code Section 25542, plaintiff was returned to prison as a parole violator. In April of 1970, plaintiff appeared for the first time before the Adult Authority for purposes of a parole revocation hearing. Plaintiff was charged with violating 12 parole conditions, including charges of "moving without permission" and "being a corporation president without permission." At that time plaintiff refused to plead to the charges unless he was first permitted elemental due process rights which would permit him to rebut any false charges in the record. This request was denied, and plaintiff was summarily found guilty of all charges, whereupon his parole revoked.

b. In February of 1972, plaintiff appeared before defendants Edman and Bowler for a sentence determination and parole release hearing. During the hearing, one of the defendants stated that plaintiff



was responsible for defrauding a number of persons connected with plaintiff's former business venture of approximately $250,000. Plaintiff replied that in the 19 volumes of transcripts from his trial, ample and overwhelming evidence disproved that statement totally, and that he had not been responsible for any losses whatsoever. However, plaintiff was not permitted to rebut defendants' totally false statement by other than his own statement, unsupported at the hearing by the evidence which he was not permitted to adduce. Plaintiff Van Geldern did not receive advance notice of these charges nor detailed specification of them. Plaintiff was not able to have the transcripts considered nor in any other way to furnish evidence rebutting these charges.

c. At the said February, 1972 hearing plaintiff was advised that his case would be submitted to an en banc proceeding before all 8 members of the Adult Authority, assisted by defendant Spangler, at which plaintiff would not be present. In late May of 1972, the Adult Authority meeting en banc and in the absence of plaintiff, refused to determine his sentence or to grant parole.

d. Although plaintiff does not know the full contents of his central file, upon which sentence fixing and parole determinations are substantially based, he is informed and believes and therefore alleges that his central files contain false, inaccurate, misleading, distorted and prejudicial contents, and that these contents formed, in substantial part, the basis for the May 1972 parole denial. Plaintiff has on many oc-

casions requested to review his central file, specifically in March of 1970 and December of 1971, and prior to the filing of this case plaintiff's attorneys herein made formal request to review said file, in order to ascertain the exact contents thereof, and to correct the false and misleading information contained therein, but all such requests have been denied by defendants. Plaintiff Van Geldern also requested to be represented by counsel at the Adult Authority hearings determining revocation and reconsideration for sentence-fixing and parole, to present evidence in his behalf at said hearings, and to confront and examine those submitting charges and allegations against him at said hearings. All said requests have been denied by defendants.

*Plaintiff James Murrin (representing subclasses A and C)*

14.a. On or about February 19, 1970 plaintiff James Murrin was sentenced to a term of five years to life on a conviction of violation of Penal Code Section 211. On or about May 31, 1972 plaintiff Murrin appeared before a panel of the Adult Authority at the Correctional Training Facility at Soledad, California, and his term was fixed at six years, with parole granted effective April 2, 1973. At said time the Adult Authority stipulated that plaintiff Murrin be placed in a prison camp as an auto mechanic. Plaintiff Murrin subsequently applied for camp placement as an auto mechanic and received an assignment as auto mechanic in keeping with the Adult Authority's parole stipulation. Plaintiff Murrin was consequently transferred to the Sierra Con-



servation Camp at Jamestown, California. Shortly after his arrival plaintiff Murrin was placed in a physical fitness training program (Hereinafter "P.F.T.") which he believed was a requisite for the camp "Special Skills Auto Mechanic" program stipulated by the Adult Authority. He shortly thereafter learned, however, that the P.F.T. program was unrelated to the special skills auto mechanic program, and he also found the P.F.T. program extremely difficult physically and ultimately impossible for him to perform. He thus asked to be re-assigned out of P.F.T. and to be placed in the special skills auto mechanic camp as per the Adult Authority stipulation and pursuant to the reason for his transfer to Jamestown. His request was refused

b. On or about July 12, 1972 and again on July 24, 1972 plaintiff Murrin was given CDC 115 disciplinary reports, subsequent to appearances before a staff member of the Jamestown facility. On or about August 7, 1972 prison authorities at Jamestown, agents and employees of defendant Procunier, placed plaintiff Murrin on the special proceedings review calendar of the Adult Authority. On or about September 7, 1972 the Adult Authority rescinded its determination of May 31, 1972 fixing plaintiff Murrin's term and granting parole. Plaintiff Murrin's parole date of April 1973 was taken from him and he was placed on the representatives calendar for April 1973. The Adult Authority based its said action on the two disciplinary proceedings of July 12 and July 24, 1972. On or about October 31, 1972 plaintiff Murrin's request for rehearing before the Adult

Authority was denied. At neither the disciplinary hearings, nor the Adult Authority proceedings hereinabove referred to was plaintiff Murrin permitted to introduce evidence, review his file, have representation of counsel or counsel-substitute, nor have his contention that he was sent to Jamestown for auto-mechanic training and not for the physical fitness training program which was unrelated to the auto mechanic training program fairly considered. Subsequent to the rescinding of plaintiff's date and the denial of rehearing by the Adult Authority, plaintiff Murrin was sent to the Conservation Camp #5 at Miramonte, California (Fresno County) where he is presently performing on the work crew. Plaintiff Murrin incurred no other disciplinary infractions, caused no disruptions, performed everything which was requested of him save that he requested that he be removed from the P.F.T. program and placed in the special skills auto mechanic program as per the Adult Authority's stipulation in May of 1972. Plaintiff Murrin's sentence was automatically refixed at "the life top" by the said rescission. Plaintiff Murrin alleges that there was no good cause nor any legal cause whatsoever to rescind his term fixing and parole date by the Adult Authority.

*Plaintiff George Chatfield (representing subclasses B and C)*

15.a. On or about June 13, 1968 Plaintiff George Chatfield was placed on parole following a term in California State prison for robbery. Shortly after his release, he suffered a complete nervous breakdown



in which he became the victim of a psychotic delusion that he was a bodyguard to President Kennedy; that President Kennedy had not been killed, but kidnapped; and that he had been instructed to rob a bank in order to obtain money for the President's ransom.

b. On or about February 27, 1969 he was apprehended by federal authorities for the robbery of a federally insured bank in Santa Rosa, California. He escaped from said custody and was again apprehended in Washington State on or about October 13, 1969 and returned to San Francisco. In San Francisco, pursuant to an order of the United States District Court for the Northern District of California, he was evaluated and examined to determine his competency to stand trial on the bank robbery charge. On or about February 12, 1970, the examining psychiatrist determined that Plaintiff was mentally incompetent to stand trial or to understand the charges against him and that he suffered from a paranoid, schizophrenic reaction.

c. A further, more detailed examination was ordered by the Court, pursuant to which Plaintiff was sent to California Medical Facility at Vacaville (hereinafter "CMF") for examination by CMF's chief psychiatrist, A.G. Nugent, M.D. On or about April 13, 1970, following extensive examination, Dr. Nugent concluded that plaintiff was a schizophrenic and that he was suffering an acute schizophrenic illness of psychotic proportions. Dr. Nugent further concluded that Plaintiff was mentally incompetent to understand

the proceedings against him or to assist in his own defense.

d. Plaintiff was then committed to the Medical Center for Prisoners at Springfield, Missouri, where he remained—except for a brief period when he was returned to San Francisco—until August, 1971. Psychiatric evaluations during this period by Springfield staff and by psychiatrists for Plaintiff establish that Plaintiff was schizophrenic and that he needed institutionalized psychiatric treatment and supervision for an indefinite period of time.

e. Because of the likelihood of an insanity defense prevailing at any trial on the federal bankruptcy charges, the United States Attorney elected to dismiss the federal charges in August, 1971. Plaintiff was thereupon returned to California state prison to face parole violation charges which included a charge that he committed the same bank robbery which had just been dismissed in Federal Court. Plaintiff was at this time still schizophrenic and paranoid and incapable of assisting in any defense, or of arguing to the Adult Authority that he should be committed to a mental institution.

f. Plaintiff first appeared before two members of the Adult Authority at a parole revocation hearing in December, 1971. At said time he requested the right to have an attorney. Said request was denied. He was then asked to plead guilty or not guilty to the parole violation charges against him. Plaintiff then stated that he could not enter a plea without some assistance, and that he did not know what the charges were about



nor did he understand them. The panel refused all requests for assistance, adjourned the revocation hearing, and summoned plaintiff to a new hearing in January, 1972. At the January, 1972, hearing, two Adult Authority members badgered and pressured plaintiff for over an hour to plead either guilty or not guilty to the charges against him and refused again to permit him to be represented by counsel. Plaintiff again declined to enter either plea without legal assistance, and left the revocation hearing. In his absence, the panel found Plaintiff guilty of having violated conditions of his parole, revoked said parole, refixed his sentence at the maximum of life, and returned him to state prison to finish his term. Plaintiff has been in San Quentin Prison ever since.

g. At each of the foregoing hearings before the Adult Authority, the panel members acted without affording plaintiff any opportunity to make a coherent presentation of his case since he was incompetent and insane. The Authority therefore did not have a full, complete, or accurate picture of the facts of his case, nor did it have before it any analysis of what possible dispositions short of a new state prison commitment were available in plaintiff's case.

16. Petitioners are informed and believe and therefore allege, in addition to the allegations of paragraph 2 incorporated herein by this reference, that:

a. Defendant Adult Authority members, hearing representatives, and administrative officers have no expertise in arriving at fair decisions concerning parole date rescission, parole revocation, term fixing and pa-

role release. To the contrary, said members, representatives, and administrative officer are quite unsuited for the task as a result of:

(i) The narrow partisan background which virtually every one of them possesses, due to having been for many years a law enforcement officer, and by the punitive anti-prisoner biases which they possess; and

(ii) Their experience as Adult Authority members, representatives or administrative officer, which has led them to adopt rigid and stereotyped thinking patterns pursuant to which they look more for the quality or servility than for those qualities which would, in fact, portend success on parole.

b. The persons who serve as members and representatives of the Adult Authority do not reflect a wide or representative cross-section of the population of California, but instead manifest attitudes which militate against a fair and open attitude in assessing parole readiness.

c. At the hearings, panel members rely heavily upon written material which is unreliable, because composed of reports which (i) are often false, malicious, inaccurate or misleading, (ii) are essentially one-sided, insofar as they contain almost exclusively adverse material, without a correponding emphasis upon the positive aspects of an inmate's prison behavior, (iii) are placed in an inmate's file through a process which contains no substantial safeguards whatsoever to determine reliability, and (iv) may not



be reviewed by the inmate who is therefore unable to refute even the most demonstrably untrue information.

d. In appearing before an Adult Authority Panel, many inmates are so fearful, tongue-tied or lacking in the ability to organize and articulate their position that they are unable to make an effective presentation of their case, or even on occasion to respond accurately to questions posed by the panel. Usually, the inmate has no idea what the two panel members are concerned about. Sometimes the panel explicitly informs the inmate of their particular concerns, and sometimes it does not. The impression which the panel members receive concerning the inmate is often quite different from the truth.

e. In almost every hearing the panel members do not have sufficient time (i) to thoroughly review the relevant written material before them, (ii) to conduct a thorough and meaningful interview with the inmate, or (iii) to arrive at an informed decision pursuant to a discussion of the case.

f. Inmates are often told, at a term-fixing hearing, that particular accomplishments (e.g. participation in vocational training or group counseling) are expected of them prior to their next appearance before the Adult Authority, if they are to have their sentence fixed and parole granted. Often, however, the inmate will accomplish the very matters prescribed, only to be told by 2 different members or representatives at his next hearing that those accomplishments are irrelevant and that some one or more other items must be performed during the subsequent year. Such incon-

sistency from year to year, and between different members and representatives of the Adult Authority, causes frustration, bitterness and hostility in many inmates, and is therefore anti-rehabilitative in nature.

g. Because of the foregoing considerations set forth in this paragraph, the decisions reached and the actions taken by Adult Authority members and representatives herein complained of, are based upon (1) mere whim and caprice, reflecting primarily the panel member's personal predelictions, (ii) discriminatory considerations, reflecting primarily the panel member's own political, racial, and other biases and/or (iii) criteria which in fact do not correspond to the likelihood of success on parole, and therefore are not based upon the "good cause" required by State law and the Federal Constitution.

h. Hearings held by the Department of Corrections to adjudicate alleged rules infractions and to impose disciplinary sanctions including prolonged isolation and loss of privileges or to write and lodge reports of infractions and other incidents in the permanent central files of inmates are conducted arbitrarily and capriciously. Investigation of the facts of such alleged infractions is biased and incomplete and inmates are not given an opportunity to rebut or, in many cases, even to see the evidence against them. When formal hearings are held at all they are conducted by partial and interested personnel. Neither the inmate nor any representative of the inmate is permitted to see his central file even though items in said file are frequently used as evidence against him.



These procedures are not designed to and in fact do not develop the critical facts on which administrative decisions are made and reports made.

i. State prisoners perceive Adult Authority and Department of Corrections hearings to be eminently unfair, and they share a widespread belief that the Adult Authority and the Department consistently act in an arbitrary, discriminatory, and illegal manner; that their central files, upon which the Adult Authority places heavy reliance, contain much untrue and misleading information; and that the indeterminate sentence implemented through the type of hearing presently conducted by the Adult Authority, is fundamentally unfair. In fact, the type of Adult Authority and Department of Corrections hearings described herein cause grave and extensive anxiety and suffering.

j. The intended benefits of the indeterminate sentence have, in fact, been utterly perverted by the defective hearings conducted by the Adult Authority, as described herein. The result is that California presently exacts the longest sentences in the nation, and is holding in confinement literally thousands of inmates who should not be imprisoned by any rational criteria, thereby inflicting needless massive human suffering.

*Legal Claims*

17. While acting under color of the law of the State of California, as more fully described in paragraphs 8 through 16 thereof, defendants have deprived

plaintiffs and their subclasses of the following rights which are secured to them by the United States Constitution:

a. The right not to have a decision by the Adult Authority, which fixes an inmate's term and sets a date for his release on parole, rescinded in the absence of (a) good cause therefor, and (b) fundamental procedural safeguards, secured by the Due Process Clause of the Fourteenth Amendment;

b. The right not to have their parole revoked in the absence of (a) good cause therefore, and (b) fundamental procedural safeguards, secured by the Due Process Clause of the Fourteenth Amendment; and

c. The right not to have term-fixing and parole release decisions made in the absence of counsel and other fundamental procedural safeguards, secured by the Sixth and Fourteenth Amendments to the United States Constitution.

d. The right not to have disciplinary sanctions imposed for alleged violation of prison rules, or reports of said violations placed in inmate central files in the absence of a fair and impartial investigation of the facts, a hearing before an impartial tribunal whenever serious disciplinary sanctions are considered, the right to counsel whenever serious sanctions are considered, and the right to view and examine the inmate's central fiile, all of which rights are secured by the Fifth and



Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

e. The right to be free from prolonged incarceration and isolation in the absence of any of the procedural safeguards enumerated above under conditions which shock the general conscience and are intolerable to fundamental fairness, which constitute punishment greatly disproportionate to any offense for which they are imposed and which go beyond what is necessary to accomplish any legitimate penal aim, all secured to plaintiffs and their class under the Eighth Amendment to the United States Constitution.

18. An actual controversy has arisen and now exists relating to the rights and duties of the parties, in that defendants have denied and continue to deny to plaintiffs and their subclasses the constitutional rights set forth in paragraph 17 hereof. As a result of these violations, plaintiffs and the members of their subclasses have been and will continue to be irreparably injured by the aforesaid conduct of defendants unless this Court grants the declaratory and injunctive relief which they seek. Plaintiffs have no plain, adequate, or complete remedy at law to redress the unlawful acts compained of herein.

*Wherefore,* plaintiffs and their class request that this Court:

1. Issue a declaratory judgment that the acts of defendants enumerated in paragraphs 2, 8, 9, 10, 11,

12, 13, 14, 15, and 16 of this complaint with respect to the revocation, rescission, or suspension of parole; the refixing or fixing of sentences; or the imposition of sanctions for alleged rules infractions contravene the rights of plaintiffs and their class under the Fifth, Sixth, and Eighth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution;

2. Issue a preliminary and thereafter a permanent injunction requiring defendants, their agents, employees and representatives to accord plaintiffs and their classes the following rights:

A. (1) timely notice of all proceedings and hearings to perform any of the acts enumerated in subparagraph B and timely and informative notice of all charges including a statement of the charge and of the evidence to be relied upon; and an opportunity to conduct a timely review of the entire central file;

(2) an opportunity to be heard, to present witnesses, and to cross-examine witnesses;

(3) the right to be represented by counsel at any hearing;

(4) the right to be heard by an unbiased panel or official and the right to challenge any panel or official for cause;

(5) the right to a verbatim transcript of any hearing and a written statement of the reasons for performing or refusing to perform the acts enumerated in subparagraph (b) and a written statement of the evidence relied on;



B. The hearings at which the guarantees enumerated above are to be accorded are:

(1) revoking, suspending or rescinding parole or refixing or otherwise increasing sentences;

(2) fixing or refusing to fix the terms of inmates;

(3) imposing serious disciplinary sanctions.

3. Certify that this action may be maintained as a class action;

4. Grant such other and further relief as to the Court seems appropriate including retaining jurisdiction in this matter.

Dated: November 15, 1972

Respectfully submitted,
By /s/ B. E. Bergesen, III
B. E. Bergesen, III
Fay Stender
Ezra Hendon
Siegried Hesse
Attorneys for Plaintiffs

### Affidavit of John Van Geldern

State of California
County of San Luis Obispo—ss.

John Van Geldern, being first duly sworn, deposes and says:

On or before July 7, 1972 I caused to be filed in the United States District Court for the Northern District of California, a complaint similar but different than the complaint in *John van Geldern vs. Kerr et al,* involving some of the same plaintiffs and some of the same defendants, and asking for some relief similar to that prayed for in *van Geldern vs. Kerr.* I prepared the pleadings in the said earlier complaint in pro per, and the complaint was filed in pro per. Entitled *van Geldern vs. Edmonds* it was numbered C-72-1251 SW, and it was never served. Immediately after filing said complaint, it was brought to my attention that certain documents necessary to the relief being sought were not prepared or on file, and during the time in which I undertook to prepare said documents, I also was able to interest private counsel, not in representing the plaintiffs in *van Geldern v. Edmunds,* but in preparing a different lawsuit dealing with some of the same problems, and additional ones as well. At the time I caused the earlier case to be filed, I was unaware of the Local Rule requiring counsel to file, immediately, a Notice of Related Case if they believed that their case came within the Local Rule on Related Cases, and I was specifically unaware of the case of *Hamlin v. Nelson,* C-71-342 RFP which



was pending in the Northern District and which raised most of the issues in *Van Geldern v. Edmunds* and in *Van Geldern v. Kerr.* I thus did not file a Notice of Related Case at that time. I was also unaware of other cases pending in the Northern District which my present counsel inform me may raise many of the issues raised in *Van Geldern v. Kerr.*

/s/ John Van Geldern
John Van Geldern

[Jurat Omitted in Printing]

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### Affidavit of George Chatfield

State of California
County of Marin—ss.

George Chatfield, being first duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action.

I have read the foregoing complaint and the same is true of my own knowledge, except as to those matters which are stated to be on information and belief and as to those matters I believe it to be true.

/s/ George Chatfield
George Chatfield

[Jurat Omitted in Printing]

### Verification

State of California
County of San Luis Obispo—ss.

John Van Geldern, being first duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I have read the foregoing complaint and the same is true of my own knowledge, except as to those matters stated to be true on information and belief and as to those matters I believe it to be true.

/s/ John Van Geldern
John Van Geldern

[Jurat Omitted in Printing]

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### Affidavit of Robert Newton Gardner, Jr.

State of California

County of San Luis Obispo—ss.

Robert Newton Gardner, Jr. being first duly sworn, deposes and says:

I am one of the plaintiffs in the above-entitled action. I have read the foregoing complaint and the same is true of my own knowledge, except as to those matters stated on information and belief and as to those matters I believe it to be true.

/s/ Robert Newton Gardner, Jr.
Robert Newton Gardner, Jr.

[Jurat Omitted in Printing]



**In the United States District Court**
**for the Northern District of California**

**[Filed June 21, 1973]**

[Caption Omitted in Printing]

### Request for Production of Documents

Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs hereby request that defendants, and each of them, produce for inspection and copying at 9:00 A.M. on July 21, 1973, at the offices of the Attorney General of the State of California, 350 McAllister Street, San Francisco, California, each of the following documents:[1]

1. All files maintained by the California Adult Authority and/or by the California Department of Corrections upon each of the named plaintiffs, including *without limitation* each inmate's central file, his so-called AW file, his central office file, and every other file or portion thereof, including all material which has been removed from any such file and is still in the possession of the Adult Authority or the Department of Corrections, or by any subdivision, officer or employee thereof. These files and materials are to be produced *in their entirety*.

---

[1]As used herein, the term "document" or "documents" includes all correspondence, memoranda, or other records or writings of any kind or copies thereof where the originals are not available, including, without limitation, files, books, pamphlets, periodicals, letters, reports, charts, diagrams, records, drafts, studies, working papers, notes, papers, ledgers, journals, or other books of account, minutes of meetings (including, without limitation, every sort of staff meeting held by the California Adult Authority or the California Department of Corrections) diaries and personal inter-office memoranda.

2. All documents which set forth the substantive standards or criteria which the Adult Authority has used, at any time during the past 5 years, in making its decisions with respect to (1) parole granting, (2) term fixing, (3) parole recession, and (4) parole revocation.

3. All documents which have been used by the Adult Authority or by the Department of Corrections which set forth the procedures to be followed by members, hearing representatives and other employees of the Adult Authority, and by officials or employees of the Department of Correction, in making the 4 types of decisions listed in the preceding item, as well as the contemplated role of inmates in those proceedings.

4. The agendas prepared for, and the minutes or summaries of, each meeting held by the Adult Authority or by any committee or subdivision thereof, including without limitation the minutes of all Executive Meetings and all Special Meetings, for the last 5 years.

5. Every general index, or guide, or table of contents, or similar document with respect to the files maintained by the Adult Authority.

6. CDC Memorandum signed by R. E. Doran, dated July 19, 1972, addressed "Attention: Classification and Parole Representatives" and sent to each institution operated by the California Department of Corrections.

7. All files, including all personnel files, which are maintained by the Adult Authority or by the Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the Executive Officer of the Adult Authority.



8. The monthly itineraries which list the day-by-day assignments of all of the Adult Authority members and hearing representatives at the various institutions, or in Sacramento.

9. A copy of the testimony of each member or hearing representative or the Executive Officer of the Adult Authority before any executive, judicial, or legislative body (e.g. a legislative committee or subcommittee) given within the past 5 years.

10. The full texts (or summaries, if texts are not available) of each speech made before any group whatsoever, whether public or private, or on any radio or television program, or in any panel discussion or conference, made by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years.

11. Each list of appearances before public or private groups or organizations made by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years.

12. All statistics whatsoever concerning the operation and performance of the California Adult Authority and any of its members, hearing representatives or the Executive Officer during the past 5 years. Solely by way of example, and without limiting in any way the generality of this particular request, statistics should be published showing, for each year (or

month, if possible) the percentage of inmates granted parole, broken down by institution, crime, amount of time served, and the like; the number and percent of inmates who have had parole rescinded or revoked; the voting records of the individual members and representatives (e.g. in terms of number and percent of paroles granted/denied, paroles revoked/not revoked, etc.;) and each one of the monthly reports referred to by defendant Kerr at page 19 of his deposition taken on January 22, 1973.

13. Each document which shows the voting records of every member and hearing representative for the past 5 years.

14. Each report submitted by any member, hearing representative, Executive Officer, or any other employee or official of the Adult Authority, including without limitation all reports of the type indicated at lines 9-11 of page 21 of the aforementioned deposition.

15. All written statements written or delivered by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years favoring, opposing, or in any way commenting upon bills or other legislation or legislative proposal pending in the U.S. House of Representatives, the Senate of the United States, or the California Legislature.

16. A copy of the most detailed breakdown of the Adult Authority budget for each of the past 5 years.

17. All studies of the Adult Authority prepared or issued by any source whatsoever, including without limitation (1) the Adult Authority or any member,



hearing representative, official or employee thereof, (2) any executive, judicial, legislative or other governmental agency or organization, (3) any private foundation or other private individual or organization.

18. All written proposals for any change whatsoever in the organization or operation of, qualifications for, or substantive criteria and procedures to be employed by the Adult Authority, including without limitation any of the individuals or groups listed in the foregoing item.

19. All articles prepared for publication (whether or not they were ever published) by any member, hearing representative, official or employee of the Adult Authority.

20. All memoranda written by the Chairman of the Adult Authority during the past 5 years, no matter to whom sent, including without limitation memoranda sent to other government organizations, agencies or officials, or to other members, hearing representatives, officials or employees of the Adult Authority.

21. All documents in effect on November 15, 1972 which pertain to any Policy Statement or Resolution issued by the Adult Authority, including without limitation any file maintained on any Resolution or Policy Statement and all such documents executed or issued subsequent to that date.

22. All documents, however formal or informal, issued during the past calendar year, which concern the Adult Authority's adoption of new policies, pro-

cedures, criteria, and the like, to be followed by members, hearing representatives, officials and employees, including without limitation all documents relating to a) Policy Statement No. 24, Adopted March 27, 1973, and b) Resolution No. 129, revised and reissued May 21, 1973.

With respect to any and all of the foregoing documents, reference is made to said documents as they existed on June 21, 1973, together with all additions thereto between said date and the actual date of inspection by attorneys for plaintiffs. In other words, no such documents are to be withheld from said inspection, even though they might in the ordinary course be discarded or destroyed by defendants prior to the inspection date.

Inspection and copying shall continue from day to day until attorneys for plaintiffs have completed their review of these documents.

Dated: June 19, 1973

B. E. Bergesen, III
Fay Stender
Ezra Hendon
Siegfried Hesse
/s/ Ezra Hendon
Attorneys for Plaintiffs

[Statement of Service Omitted in Printing]



United States District Court
Northern District of California

[Filed November 30, 1973]

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE TO PLAINTIFFS' REQUEST FOR PRODUCTION OF DOCUMENTS

Plaintiffs have requested, pursuant to Rule 34 of the Federal Rules of Civil Procedure the production of the documents listed below.

The documents which will be produced pursuant to plaintiffs' requests will be made available for inspection at the agency or department in whose custody those documents are normally kept. Inspection may take place only during the normal office hours of that agency or department and pursuant to any regulations promulgated by it pursuant to California Government Code section 0253. Notice must be given to the records officer who has custody over the documents sought at least ten working days prior to the date inspection is desired. Inspection of documents listed in the notice must be completed within sixty days of commencing inspection. All copying is to be done at plaintiffs' expense, on the premises and under the supervision of the agency or department involved. Unless otherwise stated all documents will be produced at the office of the Adult Authority in Sacramento.

1. "All files maintained by the California Adult Authority and/or by the California Department of Corrections upon each of the named plaintiffs, including *without limitation* each inmate's central file, his so-called AW file, his central office file, and every

other file or portion thereof, including all material which has been removed from any such file and is still in the possession of the Adult Authority or the Department of Corrections, or by any subdivision, officer or employee thereof. These files and materials are to be produced *in their entirety.*"

According to the provisions of the California Penal Code section 2081.5 these documents may not be disclosed absent a waiver of that privilege. Calif. Evid. Code § 1040(b)(1). With respect to the inmate's central file a limited waiver of privilege has been made and the items contained therein listed in Appendix A attached to this response will be produced. Those items listed in Appendix B will be produced after review if found not to contain confidential matter. No waiver has been entered as to the rest of the inmate's central file. They will be available for inspection at the institution where the individual plaintiffs concerned is confined. For those plaintiffs on parole their files are available at the regional parole office for the area to which they have been paroled. For the plaintiff on parole out of state his file is available at the interstate parole office located in Sacramento.

2. "All documents which set forth the substantive standards or criteria which the Adult Authority has used, at any time during the past 5 years, in making its decision with respect to (1) parole granting, (2) term-fixing, (3) parole recession, and (4) parole revocation."

The regulations, resolutions, and policy statements of the Adult Authority, to the extent that they exist



and are in the custody or under control of a party to this action will be made available at the Adult Authority's office in Sacramento. To the extent this request may seek material privileged by California Government Code section 6254(a) defendants object.

3. "All documents which have been used by the Adult Authority or by the Department of Corrections which set forth the procedures to be followed by members, hearing representatives, and other employees of the Adult Authority, and by officials or employees of the Department of Corrections, in making the 4 types of decisions listed in the preceding item, as well as the contemplated role of inmates in those proceedings."

Defendants are unable to determine from the description of the request if any such documents exist or are in their custody or under their control beyond those which will be produced pursuant to request No. 2 above.

4. "The agendas prepared for, and the minutes or summaries of, each meeting held by the Adult Authority or by any committee or subdivision thereof, including without limitation the minutes of all Exeutive Meetings and all Special Meetings, for the last 5 years."

The purpose of the California Adult Authority meetings are to make a full and complete study of the cases of all prisoners whose terms of imprisonment are to be determined by them. Hence, documents sought to be produced by this request would involve disclosure of information acquired in confidence by the California Adult Authority concerning virtually

every adult male inmate who has been confined in a California state penal institution during the last five years. The California Adult Authority asserts the privilege against the disclosure of this information. *See* Calif. Govt. Code §§ 6254(a), (c), (f) & (k); Calif. Evid. Code § 1040(b) (1), (2).

5. "Every general index, or guide, or table of contents, or similar document with respect to the files maintained by the Adult Authority."

Defendants object to the production of those documents requested in this item pursuant to Federal Rules of Civil Procedure 26(b)(1) since the defendants cannot perceive the relevance of these items to the subject matter of this litigation. Most of the files maintained by the California Adult Authority contain privileged material or are privileged themselves. Their indexes, guides, tables of contents, etc. share that privilege.

6. "CDC Memorandum signed by R. E. Doran, dated July 19, 1972, addressed "Attention: Classification and Parole Representatives" and sent to each institution operated by the California Department of Corrections."

Defendants object to the production of this interagency memoranda and questions its relevancy to the subject matter of the instant litigation. *See* Calif. Govt. Code § 6254(a); Rule 26(b)(1), Fed. Rules of Civ. Proc.

7. "All files, including all personnel files, which are maintained by the Adult Authority or by the



Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the Executive Officer of the Adult Authority."

The California Adult Authority asserts the privilege against disclosure of these documents conferred by California Government Code section 6254(c) and California Evidence Code section 1040(b)(1).

8. "The monthly itineraries which list the day-by-day assignments of all of the Adult Authority members and hearing representatives at the various institutions, or in Sacramento."

To the extent that the monthly itineraries of past assignments exist they will be made available. Defendants object to the production of monthly itineraries for future assignments on the grounds that they are irrelevant to the subject matter of the instant action and their disclosure could impair the security of the members of the Adult Authority. It should be understood that the past itineraries in defendants' possession do not reflect any changes which may have occurred following their publication.

9. "A copy of the testimony of each member or hearing representative or the Executive Officer of the Adult Authority before any executive, judicial, or legislative body (e.g., a legislative committee or subcommittee) given within the past 5 years."

Defendants do not possess the material requested and suggest plaintiffs pursue the remedy provided by Rule 34(c) of the Federal Rules of Civil Procedure.

10. "The full texts (or summaries, if texts are not available) of each speech made before any group whatsoever, whether public or private, or on any radio or television program, or in any panel discussion or conference, made by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years."

Defendants object to this request on the grounds that it does not describe the items requested with sufficient particularity so that they can determine what is sought. *See* Fed. Rules of Civ. Proc. 34(b). Specifically, defendants object to such vague language "any group whatsoever." Moreover, the scope of the request is not limited to matters relevant to the subject matter of the instant case and defendants should not be put to the burden of determining what, in the plaintiffs' view is relevant.

However, to the extent the defendants can identify material sought by this request which exists, and is within their custody or control they will make it available to the plaintiffs.

11. "Each list of appearances before public or private groups or organizations made by any member or hearing representative or the Executive Officer or the Adult Authority during the past 5 years."

To the extent such list exists, are within the custody or control of the defendants, and not previously provided by their response to request No. 8 above they will be made available.



12. "All statistics whatsoever concerning the operation and performance of the California Adult Authority and any of its members, hearing representatives or the Executive Officer during the past 5 years. Solely by way of example, and without limiting in any way the generality of this particular request, statistics should be published showing, for each year (or month, if possible) the percentage of inmates granted parole, broken down by institution, crime, or amount of time served, and the like; the number and percent of inmates who have had parole rescinded or revoked; the voting records of the individual members and representatives (e.g., in terms of number and percent of paroles granted/denied, paroles revoked/not revoked, etc.) and each one of the monthly reports referred to by defendant Kerr at page 19 of his deposition taken on January 22, 1973."

Defendants object to this request upon the grounds that it does not describe the material sought with sufficient particularity. *See* Fed. Rules of Civ. Proc., Rule 34(b). Specifically, defendants object to such vague language as "all statistics whatsoever" and "without limiting in any the generality of this particular request."

However, to the extent that defendants can determine from the request those statistics which are relevant to the subject matter of the instant litigation, which exist within their custody or control, they will be made available.

13. "Each document which shows the voting records of every member and hearing representative for the past 5 years."

Defendants object to the vagueness of this request. Specifically to the language "each document" defendants should not be put in a position having to determine which documents this request pertains.

Moreover, the items sought by this request are privileged by the provisions of the California Government Code section 6254(a) and (k) which privilege is asserted by the California Adult Authority.

14. "Each report submitted by any member, hearing representative, Executive Officer, or any other employee or official of the Adult Authority, including without limitation all reports of the type indicated at lines 9-11 of page 21 of the aforementioned deposition."

Defendants object to this request on the basis that it does not describe the items requested with reasonable particularity. *See* Fed. Rules of Civ. Proc. 34(b). They should not be put to the burden of having to determine which if any of these reports are relevant to the subject matter of this litigation. *Compare,* Fed. Rules of Civ. Proc. 26(b)(1).

Moreover, reports of the type referred to by Mr. Kerr in his deposition are privileged under the terms of California Government Code section 6254(f) and the Adult Authority asserts the privilege against disclosure conferred by California Evidence Code section 1040(b)(1).



15. "All written statements written or delivered by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years favoring, opposing, or in any way commenting upon bills or other legislation or legislative proposal pending in the United States House of Representatives, the Senate of the United States, or the California Legislature."

To the extent this request seeks documents not heretofore made available in response to items 9 and 10 above it seeks matter privileged under California Government Code section 6234(a) and the California Adult Authority asserts this privilege.

16. "A copy of the most detailed breakdown of the Adult Authority budget for each of the past 5 years."

Defendants object to this request in that it is overbroad, seeks matter not relevant to the subject matter of the instant litigation, and places the defendants in a position of having to determine which if any items are properly requested. A copy of the budget of the State of California is published annually and available to plaintiffs at most libraries. It contains the budget for the California Adult Authority. An additional breakdown of any item listed in the published budget, relevant to the subject matter in the instant litigation will be provided to plaintiffs upon request.

17. "All studies of the Adult Authority prepared or issued by any source whatsoever, including without limitation (1) the Adult Authority or any member, hearing representative, official or employee thereof,

(2) any executive, judicial, legislative or other governmental agency or organization, (3) any private foundation or other private individual or organization."

Defendants object to the scope of this request in that it seeks material irrelevant to the subject matter of the instant litigation and does not describe the material sought with sufficient particularity so that the defendants can identify it. Defendants specifically object to such vague language as "issued by any source whatsoever."

Moreover, the request attempts to compel the defendants to produce material which is not within their custody or control. Defendants suggest if plaintiffs wish this type of information they proceed pursuant to Federal Rule of Civil Procedure 34(c) and bring an independent action against "any executive, judicial, legislative or other governmental agency or organization, any private foundation or other private individual or organization" which they feel may have material relevant to the instant action.

However, to the extent that the defendants are able to identify material apparently sought by this request, which exists, is within their custody or control and has previously been published they will make it available to plaintiffs. With respect to studies or reports not previously published the California Adult Authority asserts the privilege against disclosure conferred by California Government Code section 6254 (f).

18. "All written proposals for any change whatsoever in the organization or operation of, qualifica-



tions for, or substantive criteria and procedures to be employed by the Adult Authority, including without limitation any of the individuals or groups listed in the foregoing item."

Defendants object to the scope of this request in that it seeks material irrelevant to the subject matter of the instant litigation, and does not describe with sufficient particularity the material sought so that the defendants can identify it.

Defendants further object on the grounds of the language of the request is too vague for them to identify the items sought. Specifically they object to such language as "any change whatsoever." The defendants object to the request insofar as it seeks articles prepared by or in the custody and control of persons not parties to this action.

19. "All articles prepared for publication (whether or not they were ever published) by any member, hearing representative, official or employee of the Adult Authority."

To the extent that the defendants are able to identify material sought by this request which was in fact published and still exists within their custody or control it will be produced.

The defendants object to the request insofar as it seeks articles prepared by or in the custody and control of persons not parties to this action.

With respect to unpublished works the California Adult Authority asserts the privilege of California Government Code section 6254(a) and California Evidence Code section 1040(b)(2).

Defendants further object on the basis that the material sought is not relevant to the subject matter of the litigation involved in this case.

20. "All memoranda written by the Chairman of the Adult Authority during the past 5 years, no matter to whom sent, including without limitation memoranda sent to other government organizations, agencies or officials, or to other members, hearing representative, officials or employees of the Adult Authority."

Defendants object to this request on the basis that it is too broad for them to determine whether or not it seeks material relevant to the subject matter of this litigation. Moreover, it seeks material to which the California Adult Authority asserts the privilege against disclosure. *See* Calif. Govt. Code §§ 6254(a) and (f).

21. "All documents in effect on November 15, 1972 which pertain to any Policy Statement or Resolution issued by the Adult Authority, including without limitation any file maintained on any Resolution or Policy Statement and all such documents executed or issued subsequent to that date."

To the extent not already provided in response to request No. 2 above the California Adult Authority asserts the privilege against disclosure conferred by California Government Code sections 6254(a) and (f) and California Evidence Code section 1040(b)(1).

22. "All documents, however formal or informal, issued during the past calendar year, which concern the Adult Authority's adoption of new policies, pro-



cedures, criteria, and the like, to be followed by members, hearing representatives, officials and employees, including without limitation all documents relating to (a) Policy Statement No. 24, Adopted March 27, 1973, and (b) Resolution No. 129, revised and reissued May 21, 1973."

To the extent not already provided in response to request No. 2 above, the Adult Authority asserts the privilege against disclosure conferred by California Government Code section 6254(a) and (f) and California Evidence Code section 1040(b)(1).

Dated: November 30, 1973.

Evelle J, Younger, Attorney General

Edward A. Hinz, Jr., Chief Assistant Attorney General —Criminal Division

Doris H. Maier, Assistant Attorney General—Writs Section

John T. Murphy, Deputy Attorney General

/s/ William D. Stein
William D. Stein, Deputy Attorney General
Attorneys for Defendants

WDS:md

## Points and Authorities in Support of Defendants' Objections to Production

Federal Rule of Civil Procedure 26(b)(1) limits the scope of discovery to "matter, not privileged, which is relevant to the subject matter involved in the pending action." Many records maintained by public agencies such as the California Department of Corrections and the California Adult Authority are subject to a claim of privilege by those agencies on the theory that such information is confidential in nature and its disclosure is not compelled by the public interest. Whether material is privileged is to be determined according to the law of evidence which will govern the trial. *See* Moore's Fed. Prac. Digest, ¶ 26.60(1). Where there is no conflict between the applicable law of evidence and the rules of evidence applied in the courts of general jurisdiction of the state in which the United States district court is held, the law of the latter jurisdiction should be applied. *See* Fed. Rules of Civ. Proc., Rule 43(a); Moore's Fed. Prac. Digest, ¶ 43.07.

The privilege against disclosure asserted by the California Department of Corrections and the California Adult Authority through the defendants' objections to the production of some items requested by plaintiffs rests on California Evidence Code section 1040(b)(1). That section provides in pertinent part that these departments have a privilege to refuse to disclose information acquired in confidence by their employees where disclosure is forbidden by an act of the Congress of the United States or a statute of this State. The California courts have uniformly recog-



nized that the provisions of California Government Code section 6254(a), (c), and (f) and Penal Code section 2081.5 prohibit disclosure of this material. *Yarish v. Nelson,* 27 Cal.App.3d 893, 901-902, 104 Cal. Rptr. 205, 211-212 (1972); *cf. In re Harrell,* 2 Cal.3d 675, 691, 87 Cal.Rptr. 504, 514 (1970); *Alanis v. Superior Court,* 1 Cal.3d 784, 787, 83 Cal.Rptr. 355, 357 (1970). California Evidence Code section 1040(b)(2) recognizes an additional privilege of a public entity to refuse to disclose official information where such disclosure would be against the public interest due to the necessity for preserving the confidentiality of the information which outweighs the necessity for its disclosure in the interests of justice. *See also* California Government Code section 6255 which allows a public agency to withhold records for public policy reasons. Included in the class of documents treated as confidential by a mandate of public policy are documents and records kept on file in public institutions concerning the care and treatment of inmates thereof, and files of those charged with the punishment of criminals. *Yarish v. Nelson, supra,* 27 Cal.3d at 902, 104 Cal.Rptr. at 212.

These privileges and exemptions from disclosure of public records maintained by the California Department of Corrections and the California Adult Authority are substantially identical to the Federal Public Information Act which is codified in Title 5, United States Code section 552, subd. (b). The legislative history of the federal statute demonstrates the Congressional determination that certain types of official records are not subject to disclosure. *See* 2 U.S.

Congressional and Administrative News, p. 2148, et seq. (1966). The federal courts recognize that among the records exempted from disclosure are prison and prisoner records. *See Tarlton v. United States,* 430 F.2d 1351 (5th Cir. 1970).

There being no conflict between the applicable state and federal rules of evidence concerning the privilege against disclosure of the records of the California Department of Corrections and the California Adult Authority the privilege created by California law should be recognized and applied in this case. *Compare Baird v. Koerner,* 279 F.2d 623, 628 (9th Cir. 1960).

Dated: November 30, 1973.

Evelle J. Younger, Attorney General
Edward A. Hinz, Jr., Chief Assistant Attorney General —Criminal Division
Doris H. Maier, Assistant Attorney General—Writs Section
John T. Murphy, Deputy Attorney General
/s/ William D. Stein
William D. Stein, Deputy Attorney General
Attorneys for Defendants

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*Appendix A*

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| Judgment and Commitments |
| Informations or Indictments |
| Transcript of Proceedings at time of Sentencing |
| Appellate and/or Supreme Court Decisions |
| Copies of inmate Petitions for Writs |
| Legal Status Report—CDC 195 |
| Summary of Sentence Data—CDC 112 |
| Certifications of Adult Authority Actions—CDC 245 |
| Statements of Judge, Defense Counsel, Law-enforcement agency, and District Attorney per Sec. 1203.01 PC, except inmate with life sentence |
| Probation Officer's Report |
| Arrest Reports |
| Property and Cash Receipts—CDC 104 |
| Property and Cash Release—CDC 122 |
| Body Receipts—CDC 123 |
| Notice of Complaint—CDC 263 |
| Recommendation of Disciplinary Committee & Adult Authority Action—CDC 264 |
| Warrants and Detainers and Related Correspondence |
| Parole Violation Charges & Supportive Statements—CDC 1518 |
| Work Supervisor's Report—CDC 101 |
| Chrono-Education, High School Progress Report (Gray)—CDC 128D |
| Chrono-Vocational Training Report (Blue) — CDC 128E |

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| Chrono-Education, Elementary Report (Green) — CDC 128F |
| Chrono-Interagency Services (Salmon)—CDC 128H |
| Chrono-Group Counseling Assignment (White) — CDC 128I |
| Chrono-Group Counseling Drop (White)—CDC 128J |
| Chrono-Authorization for Deposit (Green) — CDC 128K |
| Chrono-Education, College Progress Report — CDC 128L |
| CDC Fingerprint Cards—CDC 138 |
| Power of Attorney—CDC 345 |
| Inmate Accident Report—CDC 270 |
| Psychological Test Results—CDC 209 |
| Application for Mail & Visiting Privileges—CDC 105 |
| Mail & Visiting Questionnaire—CDC 106 |
| Vocational Trade Evaluation—CDC 153 |
| Trade & Industry Work Experience—CDC 153A |
| Application for Employment—CDC 147 |
| Notice of Offer of Employment—CDC 148 |
| Approval of Temporary Release—CDC 601 |
| Request for Temporary Release Under Section 2690 PC or 3306 W&I Code |
| Notice of Adult Authority Hearing—CDC 110 |
| Notice to Officials of Adult Authority Hearing—CDC 145 |
| Inquiry to Local Law Enforcement Agency—CDC 206 |
| Adult Authority Request for Transfer—CDC 267 |



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| Adult Authority Special Proceeding Vote Sheet |
| Conditions of Parole—CDC 1515 |
| Release—CDC 146 |
| Classification and Assignment Sheet—CDC 262 |
| Inmate Mail Record—CDC 119 |
| Record of Inmate Visits—CDC 120 |

*Appendix B*

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| Report of Violation of Institution Rules—CDC 115 |
| Incident Reports |
| General Correspondence |
| Chrono-Custody or General (White)—CDC 128A |
| Chrono-Classification & Social Service (Canary) — CDC 128B |
| Chrono-Medical, Psychiatric, Dental (Pink) — CDC 128C |
| Chrono-Classification Committee (Orange) — CDC 128G |

[Statement of Service Omitted in Printing]

In the United States District Court
for the Northern District of California

[Filed March 11, 1974]

[Caption Omitted in Printing]

NOTICE OF MOTION AND MOTION FOR AN ORDER COMPELLING DISCOVERY PURSUANT TO RULE 37, FEDERAL RULES OF CIVIL PROCEDURE

To defendants and to their attorneys of record: please take notice that on March 29, 1974, at 10:00 A.M., or soon thereafter as Counsel may be heard, plaintiffs will move this Court before United States Magistrate David R. Urdan, Federal Building, San Francisco, California, for an order compelling defendants herein to answer certain interrogatories previously served upon them pursuant to Rule 33, Federal Rules of Civil Procedure, and to produce for inspection and copying certain documents previously requested pursuant to Rule 34, Federal Rules of Civil Procedure. At said time and place plaintiffs will further move the Court for an order awarding to plaintiffs the costs reasonably incurred by them in obtaining the aforementioned order to compel.

This motion is made upon the ground that under the Federal Rules of Civil Procedure plaintiffs are entitled to receive said answers and to inspect said documents, and that defendants are not substantially justified in opposing said discovery and thereby requiring plaintiffs to obtain this motion to compel.



This motion is based upon the Affidavit of B. E. Bergesen, III, the proposed Order, and the Memorandum of Points and Authorities in support hereof, all of which are annexed hereto and served and filed herewith, and upon the pleadings and all of the documents on file herein.

Dated: February 28, 1974.

B. E. Bergesen, III
Fay Stender
Sidney M. Wolinsky

/s/ B. E. Bergesen, III
Attorneys for Plaintiffs

In the United States District Court
for the Northern District of California

[Caption Omitted in Printing]

AFFIDAVIT OF B. E. BERGESEN, III, IN SUPPORT OF PLAINTIFFS' MOTION FOR AN ORDER COMPELLING DISCOVERY PURSUANT TO RULE 37, FEDERAL RULES OF CIVIL PROCEDURE

I, B. E. Bergesen, III, being duly sworn, depose and say:

1. I am a member of the Bar of this Court and one of the attorneys for plaintiffs in the above-captioned case.

2. During several visits to Deuel Vocational Institution, a prison operated by the California Department of Corrections, I observed a memorandum posted upon a bulletin board in that institution. The memorandum, dated July 19, 1971, and addressed to each institution run by the Department of Corrections, was from one R. E. Doran who, upon information and belief, was formerly the Chief Classification Officer for the Department of Corrections. (See generally a paper written by Mr. Doran for the American Justice Institute, dated December, 1970, entitled "The Process of Organizational Stereotyping: The Case of the Adjustment Center Classification Committe, filed as plaintiffs' Exhibit No. 66 in *Charles v. Patterson*, No. C-71 1337 SAW (N.D. Cal.)). This memorandum reads in part as follows:

> "Some inmates become tongue-tied or emotionally involved, and during the course of the interview forget what they really desire to discuss with the Board."



3. Pursuant to Local Rule 116 of this Court, plaintiffs' counsel requested an informal conference with opposing counsel. That request was granted and on March 5, 1974, I and my co-counsel, Sidney M. Wolinsky, met with William D. Stein, Deputy Attorney General, the attorney for defendants herein, at his office. During this meeting, which lasted about an hour, counsel for plaintiffs did make a good faith attempt to resolve differences insofar as possible without court intervention. Although the meeting was amicable throughout, defendants' counsel was not willing to make any significant change in the position of his clients and did not agree to supply any further answers to interrogatories, or to produce any additional documents.

4. In preparing the instant motion to compel and supporting papers, counsel for plaintiffs have incurred expenses in the approximate amount of $750.00. Most of this amount is attributable to the time spent by this affiant and his co-counsel in researching the law; in preparing a supporting memorandum of law and the other papers being filed herewith; and in preparing for and participating in a hearing on the motion. Other miscellaneous costs include those for photocopying these documents.

/s/ B. E. Bergesen, III
B. E. Bergesen, III

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[Title Page, Table of Contents, Table of Authorities and Caption Omitted in Printing]

## Memorandum of Points and Authorities In Support of Plaintiffs' Motion for an Order Compelling Discovery Pursuant to Rule 37, Federal Rules of Civil Procedure

### *Introduction*

In their response to plaintiffs' Rule 33 interrogatories and Rule 34 request for production of documents, defendants have made a mockery out of the federal discovery process. For not only have defendants refused to produce obviously discoverable documents, they have done so by invoking patently spurious grounds and by refusing to make any showing whatever with respect to their objections. Rarely, if ever, have counsel for plaintiffs experienced such an intransigent refusal to comply with the letter or the spirit of the discovery rules contained in the Federal Rules of Civil Procedure.

Defendants' preliminary efforts, in this Court and in the Ninth Circuit, to have this case dismissed on the pleadings has already been summarized in another document.[1] When these efforts failed, and plaintiffs served defendants with the Rule 33 interrogatories and the Rule 34 request for production of documents which are the subject of the instant motion to compel,

[1]See plaintiffs' memorandum of points and authorities in support of plaintiffs' motion for an order pursuant to Rule 34, etc., filed herein on October 23, 1973.



defendants simply refused to submit any response whatsoever, until ordered to do so by this Court.[2] In this memorandum we deal with defendants' third line of defense, i.e. the interposition of objections to the interrogatories and requests which are, for the most part, wholly without merit.[3]

Empirical studies have shown that so far as Rule 34 requests for production are concerned, they are almost always honored by the answering party, and that in the great majority of cases the documents requested are produced without court intervention. See Section I, *infra*, at pages 6-7.* Doubtless this Court knows from its own first-hand experience that in most cases the broad discovery provided by the Federal Rules of Civil Procedure is accepted by opposing counsel, who devote their energies to exchanging and analyzing the basic documents, rather than attempting to withhold them from the other side. Unfortunately, this is not the approach which has been taken by these defendants who, as we shall show, have instead filed patently specious objections; have consistently failed to carry

[2]See Order filed November 15, 1973.

[3]Plaintiffs have served (1) one set of interrogatories, pursuant to Rule 33, which each defendant has answered separately, and (2) one request for production of documents, pursuant to Rule 34, as to which all defendants have collectively submitted one answer. With respect to some interrogatories, all defendants have submitted identical answers, and where this is so reference will be made, in this memorandum and the Appendix hereto, to "Interrogatory No. .....;" where the answers of the defendants differ, reference will be made to, e.g., "Hoover Interrogatory No. ....." The separate items contained in plaintiffs' Rule 34 request for production will be referred to as "Plaintiffs' Request No. ....." or "Defendants' Response No. ....."

*Pagination of all cross-references is as set forth in original documents.

their burden of *showing* that any given objection is justified, but instead relied solely upon conclusory statements of counsel; and, in many cases, have given answers that do not enable plaintiffs or this Court to know whether the documents requested are even in existence. Hence plaintiffs have been required to file this motion to compel production under Rule 37(a), with its inevitable effect of creating further delay and requiring additional court time. And, because defendants have so flagrantly violated both the letter and the spirit of the discovery rules, plaintiffs are seeking the expenses to which they are entitled under Rule 37(a)(4). It is plaintiffs' hope that the combination of a strong order to compel *plus* an award of expenses will, during the remainder of this lawsuit, "discourage unnecessary recourse to the courts." 4A Moore's Federal Practice, ¶37.02[10] at 37-44 (1972 ed.).

In this memorandum, plaintiffs will briefly discuss general discovery principles, and thereafter will show that defendants' responses are inadequate in form; that defendants have failed to make the requisite showing to support their objections; that defendants' objections based upon relevance, undue burden, inadequate specificity and privilege are without merit; and that plaintiffs should be awarded the expenses incurred by them in obtaining a motion to compel. However, since most of defendants' incomplete answers or improper objections can be rebutted only by a specific discussion thereof, plaintiffs will treat each such answer or objection *seriatim* in Appendix A



hereto, relying at that point upon the analysis of legal principles contained in this memorandum.

## ARGUMENT

### I

### Under Well Settled Principles of Federal Law, Discovery Rules Are to be Accorded a Broad and Liberal Treatment, So That a Case May Be Decided Upon the Basis of All the Relevant Facts

Normally it would not be necessary to recite those basic principles concerning the scope of discovery which, by now, have become so familiar to courts, commentators, and to most litigants. Yet defendants' intransigent refusal to submit full and proper answers compels a brief review of those principles at the beginning of this memorandum.

In 1947 the United States Supreme Court said:

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. * * * Thus civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor,* 329 U.S. 495, 507-08, 500 (1947).

As noted by the Advisory Committee, the "purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case." Committee Note of 1946 to Amended Subsection (b) of Rule 26. Thus the courts "have recognized the utility of the discovery rules and have construed them liberally so that they may achieve the purposes for which they are intended." 8 Wright & Miller, Federal Practice and Procedure, §2001 at 17 (1970 ed.); 4 Moore's Federal Practice, ¶¶ 26.02, 26.56.

Professor Wright has said that the main purposes of discovery are "to avoid surprise and the possible miscarriage of justice, to disclose fully the nature and scope of the controversy, to narrow, simplify and frame the issues involved, and to enable the party to obtain the information needed to prepare for trial." 8 Wright & Miller, *supra,* at 18-19. The end result is to put an end to the "sporting theory of justice," under which the result "depends on the fortuitous availability of evidence or the skill and strategy of counsel." *Id.* at 18-19. Or, as the Ninth Circuit has put it,

> "to take the sporting element out of litigation, partly by affording each party full access to evidence in the control of his opponent. To that end, Rule 34, like the other rules relating to discovery, is to be liberally construed." *Martin v. Reynolds Metals Corporation,* 297 F.2d 49, 56 (9th Cir. 1961).

It is also clear that the scope of discovery is much broader at the pretrial stage than it is at trial. 8



Wright & Miller, *supra,* §2001. For example, Rule 26 was amended in 1946 to provide that inadmissibility at trial is no ground for objection to discovery "if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b); *see also* Advisory Committee Note of 1946 to Amended Subsection (b) of Rule 26. Thus the "scope of discovery has been made very broad and the restrictions imposed upon it are chiefly directed at the use of, rather than the acquisition of, the information discovered." 8 Wright & Miller, *supra,* at 15.

But in the case at bar—brought under §1983 to remedy the unconstitutionality of state action—there is yet another major policy consideration favoring discovery. This second public policy, described by Chief Judge Reynolds of the Eastern District of Wisconsin,

> "is that reflected in §1983 itself. 'Its purpose is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13.' But it is the manner of enforcement which gives §1983 its unique importance, for enforcement is placed in the hands of the people. Each citizen 'acts as a private attorney general who "takes on the mantel of the sovereign,"' guarding for all of us the individual liberties enunciated in the Constitution. Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all. Thus, it is of special import that suits brought under this statute be resolved by a determination of the

> truth rather than by a determination that the truth shall remain hidden." *Wood v. Breier,* 54 F.R.D. 7, 10-11 (E.D. Wisc. 1972).

Especially is this so where, as here, it is the defendants themselves—whose allegedly unconstitutional practices are sought to be enjoined—who attempt to resist discovery and thereby to insure that "the truth shall remain hidden."

Finally, plaintiffs wish to point out that in most cases—especially where a Rule 34 request for production is concerned—the answering party does not oppose discovery. According to Professor Wright, a competent empirical study found that

> "most inspections already occur by notice, regardless of the language of Rule 34. Most lawyers cooperate with their adversaries, avoid the time-consuming preparation of papers and visits to court, and inspect and submit to inspections by informal agreement." 8 Wright & Miller, *supra,* at 613.[4]

As the Advisory Committee pointed out in its note of 1970 to Amended Rule 34, the revision of Rule 34

> "to have it operate extrajudicially, rather than by court order, is to a large extent a reflection of existing law office practice. The Columbia Survey shows that of the litigants seeking inspection of documents or things, only about 25 percent filed motions for court orders. This minor fraction nevertheless accounted for a significant number of motions. About half of these motions were

[4]The study referred to is Glasser, Pretrial Discovery and the Adversary System (1968).



> uncontested and in almost all instances the party seeking production ultimately prevailed."

Such cooperation by an answering party thus permits most of these matters to be resolved without the delay and the use of judicial time inherent in any Rule 37 motion to compel.

With these general principles in mind, we turn now to an analysis of (1) the form of defendants' answers to plaintiffs' interrogatories and request for production (Section II, *infra*) and (2) the claims of relevancy, undue burden, specificity and privilege which these answers invoke (Sections III through VI, *infra*). Finally, we shall consider the propriety of awarding to plaintiffs the expenses of obtaining an order to compel (Section VII).

## II

### Defendants' Answers Are Incomplete, Evasive, Vague, and Do Not Contain a Showing That the Objections Raised Are Valid

In line with the basic purposes of broad discovery, the rules contemplate that a request for discovery "should be answered directly and without evasion in accordance with the information that the answering party possesses *after due inquiry.*" 8 Wright & Miller, *supra,* at 559 (emphasis added). Rule 33 requires that "each interrogatory shall be answered separately and fully in writing under oath," and Rule 34 provides that a response shall be directed to "each item or category." And Rule 37 provides that for purposes of a motion to compel discovery "an evasive or incomplete

answer is to be treated as a failure to answer." Rule 37(a)(3).

Nor is it sufficient for an answering party to say that the information is not within his personal knowledge or that he is not "the best source of information requested.[5] With respect to interrogatories,

> "[a] party is charged with knowledge of what his agents know, or what is in records available to him, or even, for purposes of Rule 33, information others have given him on which he intends to rely in his suit. A party must disclose facts in his attorney's possession even though the facts have not been transmitted to the party." 8 Wright & Miller, *supra,* at 561-62.

Rule 34 imposes the same requirements on an answering party, even to the extent of requiring him to make data compilations of computerized information. See 8 Wright & Miller, *supra,* at 647-48 and 657 *et seq.* If, however, a requested document does not exist or is not within the custody, control or possession of the answering party, he is obligated to so state. 4A Moore's Federal Practice, *supra,* at ¶34.07; 8 Wright & Miller, *supra,* at 626, 641. And if a party objects to answering an interrogatory on the basis of relevance, privilege, or some other statutory ground, his objections "must be specific and supported by a detailed explanation of why an interrogatory or class of interrogatories is objectionable." 8 Wright & Miller, *supra,* at 542.

Finally, it is well settled that "[t]he burden is on the objecting party to *show* why an interrogatory is

[5]See, e.g., defendants' answer to Interrogatory No. 2.



improper." 8 Wright & Miller, *supra,* at 542-43 (emphasis added). See also *Rogers v. Tri-State Materials Corporation,* 51 F.R.D. 234, 247 (N.D. W.Va. 1970); Advisory Committee's Note to 1970 Amendment to Rule 33(a), 48 F.R.D. 523. This showing, moreover, "must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel." *Apco Oil Corp. v. Certified Transp., Inc.,* 46 F.R.D. 428, 423 (W.D. Mo. 1969). Thus courts "have insisted on a particular and specific demonstration of facts, as distinguished from stereotyped and conclusory statements." 8 Wright & Miller, *supra,* at 265. This burden has been recognized regardless of the nature of the objection.[6]

Turning now to defendants' answers, plaintiffs invite the Court's attention to four types of responses which are clearly inadequate. *First,* there is a type of evasive answer, often used by defendants, which simply does not disclose, in a forthright manner, whether a document exists and/or whether it will be produced. For example, defendants are fond of qualifying their responses by limiting production "to the extent that" a request may seek confidential matter (Request No.

[6]*E.g.,* with respect to a claim of privileges see Wright & Miller, *supra* at 126; *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 101 (W.D. Mo. 1973); *Honeywell Inc. v. Piper Aircraft Corporation,* 50 F.R.D. 117, 120 (M.D. Pa. 1970); with respect to undue burden, see 4A Moore's Federal Practice, *supra,* ¶33.20 and cases cited at 33-106, n.13: 8 Wright & Miller, *supra,* at 556; *Breeland v. Bethlehem Steel Co.,* 179 F.Supp. 464, 467 (S.D.N.Y. 1959) ("the mere statement of lack of knowledge by plaintiffs of the facts sought by defendants' interrogatories, without any mention of what effort, if any, has been made to obtain the knowledge is certainly insufficient.").

2) or "to the extent that defendants can identify materials sought by this request that exists" (Request No. 10; see also Requests No. 11, 12 and 17). Such evasions, however, do not conform to Rule 34: if such a document exists, defendants should either (i) produce it or else (ii) identify it and invoke a specific objection sanctioned by the Federal Rules of Civil Procedure; if it does not exist, defendants should so state.

*Second,* defendants have on several instances refused to answer for reasons which simply are not authorized by the Federal Rules of Civil Procedure. For example, defendants have stated that they "should not be put in a position having to determine which documents this request pertains" (Response No. 13; see also Response No. 14). But that is exactly the obligation which Rule 34 imposes upon every answering party—to identify and produce (or interpose an objection with respect to) each document to which each request pertains. Since this proposition is so obvious under the authorities cited in this section (and also Section V) of the memorandum, plaintiffs are at a loss to understand why defendants have adopted such a stance in resisting this discovery. Similarly, defendants have refused to answer interrogatories on grounds such as "an unnecessary invasion of privacy" (Interrogatories No. 1 and 2), or "that I am not the best source of information requested" (Interrogatory No. 2), or that an interrogatory is "harassing" (Interrogatory No. 1). But none of these grounds is a valid reason for objecting under the Rules.



*Third,* there are many answers to interrogatories which can only be termed unresponsive, inasmuch as they purport to — but in fact do not — answer the question asked. For example, in Brown Interrogatory No. 14, defendant Brown was asked how certain named plaintiffs were notified that particular hearings were to be held by the Adult Authority; Brown's answer, however, simply stated what "the practice is", not what in fact occurred. Similarly, defendant Brown was asked in Interrogatory No. 17 whether (and if so when) certain Board decisions were conveyed to certain named plaintiffs; yet his answer was couched entirely in terms of what "typically" happens to inmates in such situations. Such completely unresponsive answers are frequently utilized by defendants in answering the interrogatories.[7]

*Fourth,* defendants' objections are often grossly defective inasmuch as they have rarely even attempted to carry their burden of *showing* that any given objection is a valid one. Generally, this failure is most clearly seen in defendants' claims of privilege or undue burden. For example, if the terms "harassing" or "oppressive" (Interrogatories No. 1, 2, 3, 4) are to mean anything relevant to the discovery rules, they must mean that answering the interrogatory in question would impose an undue burden upon plaintiffs within the meaning of Rule 26; yet there is no attempt whatsoever to *show* that this is so. And with respect to claims of privilege based upon Section 1040 of the California Evidence Code, there is no attempt

[7]See, e.g., the answers submitted to Hoover Interrogatories No. 14, 18, 19, 20, 27, 31 and 38.

whatever to show that any given document was "acquired in confidence by a public official in the course of his duty", or that "disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." See California Evidence Code §1040. Instead, there is simply a bald claim by the Attorney General to the effect that "the Adult Authority asserts the privilege against disclosure conferred by California Evidence Code Section 1040(b)(1) (Response No. 14). Indeed, there are even some instances when defendants' purported assertion of a privilege is fudged by objecting "[t]o the extent this request *may* seek material privileged by California Government Code 6254(a)" (Response No. 2) (emphasis supplied).

Thus entirely apart from the correctness *vel non* of these claims of privilege or undue burden, defendants have simply ignored their obligation to base their objections "upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel." Indeed, it is difficult to imagine how objections could be framed in a more conclusory fashion.

## III

### Most of Defendants' Objections to Relevancy Are Patently Without Merit

Of all the objections filed by defendants, perhaps the most spurious are those going to relevancy. In their complaint, plaintiffs have made extensive and



specific allegations concerning the constitutionally fatal defects which infect the entire decision-making process by which paroles are granted, rescinded and revoked in the State of California. Specifically, plaintiffs have alleged, *inter alia*, that Adult Authority members have no expertise in reaching fair decisions, but are instead quite unsuited to the task; that inmates are unable effectively to present their views; that panel members do not have sufficient time during the hearings to arrive at an informed decision; that decisions are based upon files and other written records which are often false or misleading; that defendant Authority members apply conflicting standards; that parole decisions reached are arbitrary and discriminatory, and are based upon criteria which are not related to success on parole; and that the result of this procedure is to "imprison literally thousands of inmates who should not be imprisoned by any rational criteria, thereby inflicting massive and needless human suffering." It is plaintiffs' position that in combination these defective procedures constitute a system which is so lacking in evidentiary integrity —and is so full of injustice and the potential for injustice—as to violate the Due Process Clause of the Fourteenth Amendment.

In denying defendants' motion to dismiss, this Court has held that these allegations, if true, entitle plaintiffs to relief. Accordingly, plaintiffs are obliged to present evidence concerning all of these various components of the parole system in order to sustain their burden of proof at trial; and defendants' objections to relevance must therefore be received in the context

of those wide-ranging factual allegations. Although defendants' relevancy objections are dealt with individually in the Appendix hereto, it may be helpful to the discussion which follows to briefly mention a few such objections which are clearly without merit.

Plaintiffs' Request No. 6 seeks production of a memorandum written by a high ranking Department of Corrections official, which refers to Adult Authority hearings and which says, in pertinent part:

> "Some inmates become tongue-tied or emotionally involved, and during the course of the interview, forget what they really desire to discuss with the Board." See Affidavit of B. E. Bergesen, III, annexed to the instant motion to compel.

It is difficult to imagine a more relevant document with respect to (1) the allegations in plaintiffs' complaint that in appearing before the Authority, "many inmates are so fearful, tongue-tied or lacking in the ability to organize and articulate their position that they are unable to make an effective presentation of their case, or even on occasion to respond accurately to questions posed by the panel", and (2) the sort of due process safeguards which may be required under the Fourteenth Amendment. In addition, it would also appear to be quite relevant for impeachment purposes, since defendant Kerr has testified on deposition—and presumably will so testify at trial—that inmates *do not* have a hard time articulating their thoughts, or become tongue-tied at these hearings.[8] See *United*

[8]"Q. Isn't it true, Mr. Kerr, that a large number or large percentage of inmates are very scared and nervous at these hearings?
A. I would assume that most of them are under some tension.
Q. Yes. But beyond that, isn't there a large percentage of them that really have a difficult time organizing and articulating their thoughts at the time?
A. No, I wouldn't say so.
Q. Let me ask you this, Mr. Kerr. Do you think this is a fair statement: Some inmates become tongue-tied or emotionally involved and during the course of the interview forget what they really desire to discuss with the Board?
A. I would have no way of knowing.
Q. From five years on conducting interviews you have no feel of whether that statement is probably true or not?
A. It is such a general statement that I would have no way of knowing.
Q. Has it been your experience that some inmates become tongue-tied at these hearings?
A. No.
Q. None?
A. I don't recall a single one that was so tongue-tied he couldn't express himself."



*States v. Meyer,* 398 F.2d 398 F.2d 66, 72 (9th Cir. 1968) ("discovery is particularly important to preparation for effective cross-examination of * * * [adverse] witnesses, and is commonly employed for that purpose"). Yet defendants could still "object to the production of this inter-agency memorandum and questions (sic) its relevancy to the subject matter of the instant litigation" (Response No. 6).

Plaintiffs' Requests No. 17 and 18 seek production of all studies of the Adult Authority and all written proposals for change in the Authority, respectively. Obviously, such documents may well be admissible as evidence or, at the very least, are reasonably calculated to lead to admissible evidence on all sorts of topics involving the operation of, and procedures followed by, the Adult Authority. Yet defendants claim that each request "seeks material irrelevant to the subject matter of the instant litigation" (Responses No. 17 and 18).

Plaintiffs' Interrogatory No. 1 seeks basic information concerning the qualifications and background of the Adult Authority members. In their complaint, plaintiffs allege that said members are quite unsuited to their task, as a result of:

> "(i) The narrow, partisan background which virtually every one of them possesses, due to having been for many years a law enforcement officer, and by punitive, anti-prison biases which they possess; and
>
> (ii) Their experience as Adult Authority members, representatives or Administrative Officer, which has led them to adopt rigid and stereotyped thinking patterns, pursuant to which they look more for the quality of servility than for those qualities which would, in fact, portend success on parole." *Complaint,* paragraph 16a.

Since this allegation, if true, would afford substantial support to plaintiffs' claim that the Adult Authority's hearing procedures are unconstitutional, it can hardly be considered irrelevant within the meaning of Rule 26. Yet that is the position taken by all of the defendants in this case (See answers to Interrogatory No. 1).

Although court decisions on relevancy are by nature "extremely particularistic", 8 Wright & Miller, *supra,* at 52, the following principles can easily be distilled.

1. "Certainly the requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms. No one could suggest that discovery should be allowed of information that has no conceivable bearing on the case. But it is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." 8 Wright & Miller, *supra,* at 45-47, and cases cited; *accord*: 4 Moore's Federal Practice, *supra,* ¶26.56[1] at 26-177.



2. Under the Federal Rules, it is no ground for objection that information sought in pretrial discovery would not be available at trial, "if the information sought appears reasonably calculated to lead to the discovery of available evidence." Rule 26(b)(1); *Olympic Refining Company v. Carter,* 332 F.2d 260, 266 (9th Cir. 1964). Thus it is well settled "that the question of relevancy is to be more loosely construed at the discovery stage than at the trial." 8 Wright & Miller, *supra,* at 41.

3. In addition to discovering information pertaining to a party's case in chief, it is entirely proper to obtain information for a host of other purposes such as cross-examination of adverse witnesses, *United States v. Meyer,* 398 F.2d 66, 72 (9th Cir. 1968); determining the issues, 8 Wright & Miller, *supra,* at 41-42; and obtaining information concerning an opponent's case, *id.* at 94-95.

4. "If protection is needed, it can better be provided by the discretionary powers of the court under Rule 26(c) than by a constricting concept of relevance." 8 Wright & Miller, *supra,* at 47, and cases cited at n.24.

Plaintiffs submit that when defendants' objections to relevancy, as discussed in the Appendix hereto, are read in the light of these general principles, there can be no doubt that most of them are entirely without merit. For "the spirit of the new rules calls for every relevant fact, however remote, to be brought out for the inspection not only of the opposing party but for the benefit of the court which in due course can eliminate those facts which are not to be considered in determining the ultimate issues." *Hercules Powder Co. v. Rohm & Hacs Co.*, 3 F.R.D. 302, 304 (D. Del. 1943). Therefore it would be appropriate to strike most of defendants' relevancy objections and to require them to respond, forthwith, to plaintiffs' requests and interrogatories.

## IV

### Answering The Interrogatories Propounded Would Not Subject Defendants To Undue Burden Or Expense

Rule 26(c) enables the court, "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown," to enter a protective order to spare a party "undue burden of expense." As noted earlier, defendants appear to be resisting Interrogatories No. 1 through 4 partially on the ground of undue burden, although the terms used are "harassment" and "oppression". Yet as we have noted earlier,

> "[a] general objection that interrogatories are onerous and burdensome and require of the party to make research and compile data raises no issue. The objection must make a specific showing



> of reasons why the interrogatory should not be answered." 4A Moore-s Federal Practice, ¶33.20 at 33-106, 33-107.

Such a showing, necessary to meet the "good cause" requirement of Rule 26, is conspicuously absent from all of defendants' objections.

Equally significant is the fact that defendants seem to be laboring under a misconception as to the applicable standard of burden of expense.

> "The mere fact that compliance with an inspection order will cause great labor and expense or even considerable hardship and possibility of injury to the business of the party from whom discovery is sought does not of itself require denial of the motion. Rule 26(c) speaks of 'undue burden or expense' and discovery should be allowed unless the hardship is unreasonable in the light of the benefits to be secured from the discovery." 8 Wright & Miller, *supra,* at 647-48. See also 4A Moore's Federal Practice, *supra,* ¶33.20.

This is the approach which has been followed by the courts, which have often held that although a request encompasses a potentially large number of documents, "it is well settled that a showing of good cause[9] is not rebutted by a showing that production would be burdensome. *Camco Incorporated v. Baker Oils, Inc.*, 45 F.R.D. 384, 386 (S.D. Tex. 1968). "Every lawsuit is burdensome and expensive to the party litigants, but where it is found necessary to bring about a fair,

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[9]Prior to the 1970 Amendment to Rule 34, a party proceeding thereunder for the production of documents was required to make a showing of "good cause".

impartial and thorough administration of justice, all sources of information must be made available, regardless of expense of inconvenience resulting therefrom." *Michel v. Meier,* 8 F.R.D. 464, 477 (W.D. Pa. 1948). These quotations are merely illustrative of the many, many cases which say essentially the same thing.[10] Thus a protective order is not authorized by the mere existence of burden or expense, as defendants seem to believe, but only the existence of "undue" burden or expense.

Beyond the general language quoted above, requests for discovery under Rules 33 and 34 have on countless occasions been upheld against claims of burden and expense which were far more extreme than those raised by these defendants. Thus in *Keco Industries, Inc. v. Steurns Electric Corporation,* 285 F.Supp. 912 (E.D. Wisc. 1968), the answering party alleged that the discovery sought would involve the location and assembly of some 100,000 files. In *Alexander v. Rizzo,* 50 F.R.D. 374 (E.D. Pa. 1970), the answering party alleged that the time to complete the discovery involved "would require hundreds of employees of the Police Department many years of man hours to unearth the answers to the interrogatories and other discovery procedures pursued by counsel." *Id.* at 376. Similarly, the discovery requested in *United States v. American Optical Company,* 39 F.R.D. 580 (N.D. Cal. 1966) required "the examination of large quantities of documents, requiring a great deal of time and expense." *Id.* at 586-87. Yet in each case—as in many others[11]—the court required that discovery be made.

[10]E.g., *United States v. American Optical Company,* 39 F.R.D. 580, 587 (N.D. Cal. 1966) ("the fact that the production of documents may involve inconvenience and expense is not alone a sufficient reason for refusing discovery which is otherwise appropriate"); *Rockaway Pix Theatre Inc. v. Metro-Goldwyn-Mayer, Inc.,* 36 F.R.D. 15, 17 (E.D.N.Y. 1964) ("All sources of information should be made available, regardless of expense (citation omitted), and the mere fact that production would be onerous or inconvenient is not, per se, ground for denial of a Rule 34 motion"); *Rogers v. Tri-State Materials Corporation,* 51 F.R.D. 234, 245 (N.D. W.Va. 1970) ("Interrogatories, otherwise relevant, are not objectionable and oppressive simply on grounds that they may cause the answering party work, research and expense").



There are, of course, cases which limit or deny discovery based upon undue burden or expense; yet the correct resolution of the problem does not give conclusive effect to a showing that discovery would be burdensome or expensive. Rather, discovery

> "must be kept within bounds by weighing the burdens of production against the importance of the information sought. In the final analysis, this is what the numerous cited decisions really hold." *United States v. R. J. Reynolds Tobacco Co.,* 268 F.Supp. 769, 774 (D.N.J. 1966).

Or, in Professor Moore's words, the courts are required to weigh "the annoyance and expense involved against the value of the information sought; while the allowance of interrogatories is in the sound discretion of the court, the usual presumption is in favor of liberal discovery of relevant matters." 4A Moore's Federal Practice, *supra,* ¶33.20.

[11]See, e.g., *Camco Incorporated v. Baker Oil Tools, Inc.,* 45 F.R.D. 384 (S.D. Tex. 1968); *Rockaway Pix Theatres, Inc. v. Metro-Goldwyn-Mayer, Inc.,* 36 F.R.D. 15 (W.D.N.Y. 1964); *Michel v. Meier,* 8 F.R.D. 464 (W.D. Pa. 1948); see generally, 8 Wright & Miller, *supra,* §2174 (interrogatories); §2214 (production of documents).

With these principles in mind, we examine a few objections interposed by defendants on the ground of undue burden. For example, it appears obvious that defendants could easily answer Interrogatories No. 1 through 4 simply by referring to their own records and by submitting a questionnaire to the hearing representatives. Defendants' misunderstanding of the "undue burden" showing may also be seen in defendant Procunier's answer to Interrogatory No. 10, in which he characterizes the interrogatory as

> "vague, oppressive and harassing *in that it would require me to examine the available records of the designated plaintiffs* with a view to determining which reports or evaluations should be characterized as 'recommendations' within the meaning of the interrogatory, and if so, whether they should be deemed related to the designated actions" (emphasis added).

A similarly revealing example of defendants' erroneous view of what constitutes an "undue burden" has been submitted by defendant Charles Brown in response to Interrogatory No. 39.[12] But the limited amount of effort which these defendants would have to expend—even accepting the situation as characterized by them in their answers—is clearly not the "undue" burden of Rule 26. Therefore it may well

[12]"On the advice of counsel I decline to answer Interrogatory No. 39 on the grounds that the question is unduly vague and oppressive. Each of the designated inmates has a voluminous file containing a great deal of information. To answer the question as it reads would require an examination of the entire file, a frequent exercise of speculative judgment as to what is fairly intended by the term 'adverse comments', and an oppressively significant amount of time in identifying those comments and their sources."



be that defendants have attempted no *showing* of undue burden—as required by law—because none was possible which would conform to the principles of law summarized above.

## V

## Plaintiffs Have Designated The Documents Requested With Sufficient Specificity

Defendants have objected to several of plaintiffs' Rule 34 requests as being either "vague" or insufficiently specific.[13] Yet once again defendants' objections do not conform to the law which has been developed by the federal courts. See generally, 8 Wright & Miller, *supra,* at §2211; 4A Moore's Federal Practice, *supra,* ¶34.07.

Prior to 1970, there was an apparent conflict between the standards used by those courts which took, respectively, "a narrow view and a broad view about the specificity of a designation." 8 Wright & Miller, *supra,* at 638. The 1970 Amendment to Rule 34, however, expressly permits a designation "either by individual term *or by category.*" Rule 34(b) (emphasis supplied). This revision, in Professor Wright's view, constitutes a substantial improvement, limiting as it does "a useful line of defense for a party whose real objection to discovery was not that he did not know what documents were wanted but that he knew all too well what was wanted and did not want to produce it." *Id.* at 633.

[13]See Responses No. 3, 10, 12, 13, 14, 17, 18 and 20.

Thus it is now common for a discovering party to ask for "all documents which pertain to" a particular transaction or subject matter, and to have the answering party identify and produce those documents. See, e.g., *Keco Industries, Inc. v. Stearns Electric Corp.*, 285 F.Supp. 912 (E.D. Wisc. 1968); *Speedrack, Inc. v. Baybarz,* 45 F.R.D. 254 (E.D. Cal. 1968); *Pleasant Hill Bank v. United States,* 58 F.R.D. 97 (W.D. Mo. 1973). When such categories are used, it is clearly not feasible for a discovering party to make a definitive showing that a particular document is in the possession of the answering party. 4A Moore's Federal Practice, *supra,* ¶34.08. "The goal is that the description be sufficient to apprise a man of ordinary intelligence what documents are required and that the court be able to ascertain whether the required documents have been produced." 8 Wright & Miller, *supra,* at 631.

Putting entirely to one side defendants' curious view that they should not be required "to determine which documents this request pertains" (Responses No. 13 and 14), it is difficult to understand most of defendants' objections based upon insufficient specificity. Since each such objection can be evaluated only by reading the request to which it pertains, the Court's attention is invited to these eight requests to determine whether or not the description is sufficient to apprise a man of ordinary intelligence what documents are required and to permit the Court to ascertain whether the required documents have been produced. 8 Wright & Miller, *supra,* at 631. In plaintiffs'



view, defendants' real objection to discovery of these items is "not that * * * [they] did not know what documents were wanted but that * * * [they] knew all too well what was wanted and did not want to produce it." 8 Wright & Miller, *supra,* at 633.

## VI

## No Absolute Privilege Covers the Documents Here In Question, Nor Have Defendants Made the Requisite Showing That Defendants' Interest in Maintaining the Confidentiality of the Documents Outweighs Plaintiffs' Need to Ascertain the Truth

### A. *In This Federal Question Case, No State Privilege Applies*

#### 1. *In Federal Question Cases, State Created Privileges are not Conclusive*

In any analysis of whether documents are privileged within the meaning of Rule 26, there stands the threshold question of whether the privilege is to be determined in accordance with State or Federal law. Since most privileges are created by state law, Federal courts are frequently called upon to decide whether or not they are to be bound by a particular privilege which has been created by the state in which the court sits.

The answer to this question generally depends upon whether jurisdiction for the suit itself is predicated upon Federal or State law. "When the litigation in-

volves rights and duties that the state law has created, it is appropriate that the states, rather than the Federal court, should have the last word on the comparative importance of the relation as against the interest in arriving at the truth in the lawsuits." 8 Wright & Miller, Federal Practice and Procedure (1970 ed.) §2016 at 124. Thus the rule has emerged that in diversity cases the Federal courts will generally apply the privileges contained in the law of the state in which the court sits, *ibid.*, although even in diversity litigation "an important federal policy might yield a contrary result in some cases." 4 Moore's Federal Practice, ¶26.60[7] at 26-260. See also *Baylor v. Mading-Dugan Drug Co.*, 16 F.R.Serv.2d 1183 (N.D. Ill. 1972).

Where, however, jurisdiction is grounded upon a Federal statutory or constitutional right, the law is generally otherwise. "In cases arising under the Federal law it is abundantly clear that there is no constitutional inhibition to abrogation of state-created privileges, either in connection with the admission of evidence or in connection with pre-trial discovery." 4 Moore's Federal Practice, *supra,* ¶26.60[7]. Professor Wright agrees, stating that "[a]s a matter of policy, it seems appropriate that states should not be permitted to say when the Federal courts must refrain from hearing useful testimony in a matter involving Federal law." 9 Wright & Miller, *supra,* §2408 at 333-34.

In recent years several Federal courts have adopted the position urged by Professors Moore and Wright.



In *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970), a state-created attorney-client privilege was asserted in an action brought by stockholders against their corporation under the Securities Acts of 1933 and 1934. Although the District Court treated the Alabama law of privilege as controlling, the Fifth Circuit rejected that approach on the ground that the case was grounded on Federal rather than state law.

> "This is a federal question case (with ancillary state aspects) rather than a diversity case. Such actions are predicated on federal law, embodying federal policies. Enforcement of those policies demands that the federal courts apply their own rules of privilege where substantial state interests are not infringed." *Id.* at 1098.

Noting that courts in Federal income tax liability cases have not been bound by state attorney-client privileges, the court concluded that

> "the need for balancing competing interests in disclosure and nondisclosure is as compelling in federal questions cases as it is in tax investigations. Rule 43(a) clearly favors disclosure in trial proceedings. Disclosure in a tax investigation is no less potentially destructive of confidential relationships than in other cases. Disclosure in a whole variety of other federal question cases may be no less important in the interest of seeking the truth than in tax investigations. We find nothing in either Rule 43(a) or the Rules of Decision Act to prevent a federal court from independently weighing the competing interests in any federal question case." *Id.* at 1098-99.

The approach then adopted by the court in *Garner* was to order a "balancing of interests between inju-

ries resulting from disclosure and the benefit gained in the correct disposal of the litigation," *id.* at 1101, and to remand the case for further proceedings.

Similarly, in *Carr v. Monroe Mfg. Co.*, 431 F.2d 384 (5th Cir. 1970), cited by defendants herein, the defendants resisted discovery on the basis of a Mississippi statute which in their view created an absolute privilege against the disclosure of employment records by a state agency. The court, however, declined to construe the statute in question to determine whether or not it afforded an absolute privilege, and instead reaffirmed the position taken in *Garner v. Wolfinbarger, supra,* that "in any given instance the special federal interest in seeking the truth in a federal question case may require disclosure despite the existence of a state rule holding the same communications privilege." *Id.* at 388. The court explained its approach in the following language:

> "The granting or withholding of any privilege requires a balancing of competing policies, 8 Wigmore, §2285 at 527-28. The claim of governmental privilege is no exception; in fact, the potential for misuse of government privilege, and the consequent diminution of information about government available to the public, is one more factor which strongly suggests the need for judicial arbitration of the availability of the privilege. That the need for discovery of communications with a state governmental agency arises in a federal case in no way diminishes the need for an independent weighing by the court of the policies behind the privilege." *Ibid.*



Thus the court proceeded to balance "the potential harm from disclosure of any communication subject to a privilege" against "the benefits of disclosure." *Id.* at 390. Noting that the purpose of the action was to eradicate racial discrimination in employment, the court found that "the reasons favoring disclosure are especially compelling in the light of the nature of the case." *Ibid.*

> "The potential harm from disclosure of any communication subject to a privilege must be weighed against the benefits of disclosure. The possibility of harm to an administrative program and the invasion of privacy of persons who seek employment cannot be ignored. But in nearly every case involving similar state statutes, *supra,* n. 3, the balance has been struck in favor of disclosure in court proceedings." *Ibid.*

The court also noted in passing, as had the court in *Garner,* that the District Court could consider the possibility of entering protective orders to ameliorate or eliminate any potential harm which might result from the discovery itself. *Ibid.*

In *Baylor v. Mading-Dugan Drug Co.*, 16 F.R.Serv. 2d 1183 (N.D. Ill. 1972), the court observed that in diversity cases "the litigation is based on a state created right in which there is no justification for federal interference with the state's decision that a specific relationship is more important than the litigation." *Id.* at 1184. However, it is also noted that "federal courts have refused to honor state privileges in actions involving enforcement of rights created under

federal law," *id.* at 1184, and cases cited at n.5, since "[i]n federal question cases there may be compelling reasons for ignoring a state privilege statute and following an independent federal rules," *ibid.* Accordingly, the court concluded "that the Illinois accountant privilege is not applicable in Federal question cases." *Id.* at 1186. See also ***Fears v. Burris Mfg. Co.,*** 436 F.2d 1357 (5th Cir. 1971); ***Fraser v. United States,*** 145 F.2d 139 (6th Cir. 1944); ***Wood v. Brier,*** 54 F.R.D. 7 (E.D. Wisc. 1972).

The Court's attention is also invited to the proposed Federal Rules of Evidence, which provide that state-created privileges will not apply even in diversity cases. See 51 F.R.D. 356-83. Moreover, there is no privilege contained in the rules that would extend to the documents involved in this motion to compel. *Compare* proposed Rules 501-510. If these Rules are adopted by the Congress during its present session, they may well govern the trial of this lawsuit; at the very least, they reflect the collective thinking of the drafters of the new Evidence Code, which has decisively rejected the sort of widespread privilege for government documents here claimed by defendants.

### 2. *A Balancing of Relevant Considerations Clearly Favors Disclosure in This Case*

The reasons for rejecting such a privilege—and for resolving any balancing test against these defendants—would appear to be particularly persuasive, at least in a case of this type. ***First,*** the claim of privilege itself, which is said to have been created by the California Public Information Act—is dubious at best, as will be shown at pages 34-36, *infra. **Second,*** it has been invoked by defendant state officials who have been charged with proceeding in an unconstitutional manner, in order to keep relevant documents and information hidden from plaintiffs and from the Court.



> "Making even more compelling the need for judicial evaluation of the availability of the privilege is the fact that this is a suit against the highest official of the very government agency asserting the privilege. In such cases there is a special danger in the government official having the power to define the scope of his own privilege, free of supervision by the courts." ***Carr v. Monroe Mfg. Co., supra,*** 431 F.2d at 389.

***Third,*** the action is one brought under 42 U.S.C. §1983 to redress the deprivation of federal constitutional rights, as authorized by 28 U.S.C. §1343. Thus an important public policy which is frustrated by defendants' efforts to resist discovery "is that reflected in §1983 itself." *Wood v. Breier,* 54 F.R.D. 7, 10 (E.D. Wisc. 1972). As that court put it,

> "Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all. Thus, it is of special import that suits brought under this statute be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden." *Id.* at 11.

Stated differently, this discovery motion does not align a private party, whose interest in obtaining dis-

covery is personal to him and his interest in prevailing in the litigation, against the public interest in maintaining the confidentiality of state records. To the contrary, it is plaintiffs who here promote the public interest in making sure that the state's parole system is operating in a constitutional manner, *ibid.*, whereas the individual defendants have a considerable personal stake in maintaining the *status quo.*[14]

*Fourth,* and finally, there is the significant public interest in ascertaining the truth in any. litigation, which is, of course, the very basis for the extensive and liberal discovery rules found in the Federal Rules of Civil Procedure. Thus the search for truth has become paramount, so that

> "civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor,* 329 U.S. 495, 507-08, 500 (1947).

Against these four strong public policies, defendants' assertion of privilege is patently inadequate, since they have not even attempted to make any *showing* that the documents requested are in fact privileged. See Section II of this memorandum, *supra.*

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[14] "[A judge] should, of course, be aware that the public has an interest in seeing that justice is done in the particular cause as well as an interest in the secrecy of the information." Assembly Committee on Judiciary—Comment to Section 1040 of the California Evidence Code, 29B West's Official California Codes (1966 ed.) at 639.



Nor has there been any attempt to articulate for this Court the "policies behind the privilege," *Carr v. Monroe Mfg. Co., supra,* 431 F.2d at 386, or the precise harm which would result if defendants were to comply with the discovery here sought. (It is plaintiffs' position, of course, that no real or serious harm would in fact result from an order compelling such discovery.) Finally, defendants have attempted no showing that any legitimate concern could not be met by a protective order under Rule 26(c), which might, for example, prohibit disclosure of the documents involved to any person other than counsel for plaintiffs. For as Professor Wright has said, "[i]f protection is needed, it is better provided by the discretionary powers of the court under Rule 26(c) than by a constricting concept of relevance." 8 Wright & Miller, *supra,* at 47. And in many cases a federal court has resolved discovery motions in favor of disclosure at least in part upon its power to eliminate any real harm to the opposing party by entering a protective order. See, e.g., *Garner v. Wolfinbarger, supra; Carr v. Monroe Mfg. Co., supra.*

In addition to the cases already cited, orders compelling discovery of documents maintained by state governmental agencies are not uncommon. In *Wood v. Breier, supra,* the court overruled a police department's contention that its records were subject to a governmental privilege, and therefore could not be discovered by plaintiffs in a Section 1983 action. The court noted that the weight of similar cases was in favor of discovery, to which a conditional executive

privilege should generally yield. The court further held, in language applicable to the case at bar, that "* * * even if executive privilege would normally be applicable, when the basis of a particular suit arises from the alleged misconduct or perversion of power by a government official, as is claimed in the case before me, discovery may well be proper." 54 F.R.D. at 12.

In *Olsen v. Camp,* 328 F.Supp. 728 (E.D. Mich. 1970), plaintiffs challenged the defendant Comptroller of Currency's denial of a bank charter as arbitrary, and moved for an order requiring defendants to produce certain administrative files relating to plaintiffs' charter application. Although the Secretary of the Treasury himself had examined the file and submitted an affidavit claiming that a governmental privilege exempted it from discovery, the court balanced the public interest in suppression of the document against the need of plaintiffs in prosecuting the lawsuit, and resolved the matter in favor of discovery. As is true of plaintiffs in the case at bar, if they are unable to examine such crucial documents as their own central files, the court held that "plaintiffs would be virtually precluded from proving unreasonable conduct on the part of the defendant if they were unable to examine these documents." *Id.* at 731. Significantly, the court concluded that "the public interest can be protected by a protective order limiting perusal of these portions of the documents to the two directors and their attorneys." *Id.* at 732. See also *Alexander v. Rizzo,* 50 R.F.D. 374 (E.D. Pa. 1970).



### 3. *The Federal Public Information Act Does Not Create a Judicial Privilege*

In the very short memorandum of points and authorities submitted by defendants, it is claimed that many of these documents are privileged under *both* state and federal law. A discussion of state law is set out in the following section of this memorandum; at this point, plaintiffs will deal with defendants' implication that the Federal Public Information Act (5 U.S.C. §550 *et seq.*) creates a privilege in the "Federal Rules of Evidence" which authorizes nondisclosure of the documents in question. This argument is, at best, a non sequitur; at worst, it is an unfortunate attempt to mislead the Court. Briefly stated, defendants argue that the Act, as illuminated by its legislative history and construed in the case of *Tarlton v. United States,* 430 F.2d 1351 (5th Cir. 1970), creates a privilege within the meaning of Rule 26, Federal Rules of Civil Procedure.

As it was recently articulated and rejected by another court, this claim assumes

> "that information exempt from disclosure to the general public under the Act, by that fact alone, is 'privileged' within the meaning of F.R.Civ.P. 26(b)(1), and thus not discoverable by a civil litigant. We find that assumption to be unsound." *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 99 (W.D. Mo. 1973).

That claim is indeed manifestly unsound, since in the words of Professor Moore "the Public Information Act of 1966 . . . creates no privilege." 4 Moore's

Federal Practice, ¶26.61 [4.-2]. The whole purpose of the Act, of course, was to *expand* the access of the public to official records, *i.e.* to make "information in the files and the agencies, subject to certain specified exceptions, available to the mass media and *to the public generally.* 5 U.S.C. §522." Advisory Committee's Note to Proposed Rule 509, Federal Rules of Evidence (emphasis supplied). The exceptions to this broad grant of indiscriminate public inspection were designed to withhold certain types of information *from members of the public generally,* who are seeking to inspect official documents for any reason or for no reason at all; they were not designed to withhold them *from litigants,* who sought documents which were relevant to litigation being conducted pursuant to the Federal Rules of Civil Procedure. Accordingly, "[t]he exceptions in the Act are not framed in terms of evidentiary privilege, thus recognizing by clear implication that the needs of litigants may stand on a somewhat different footing from those of the public generally." *Ibid.* This distinction has been elucidated by Professor Moore, in his discussion of the proposed Federal Rules of Evidence, in the following language:

> "It must be remembered, however, that the Public Information Act deals with what is *public* information, that is to say information that must be supplied to any member of the public independent of need. The proposed evidence code deals, instead, with production of information at the behest of litigants whose vindication of private rights may depend upon its production. Further, discovery under the Rules is limited to information that is relevant to the subject matter of the pending action, a limitation that insures that the discovery is reasonably calculated to lead to evidence or other information needed in the adequate preparation of the case. In this context a much more narrow concept of privilege is required." 4 Moore's Federal Practice, ¶26.61 [5.-1] at 26-281.



Court decisions also support this view. Thus one court rejected an objection to discovery based upon the Act—identical to the one suggested by defendants in the case at bar—on the ground that "the Act's limitations concerning investigatory files do not apply to a party litigant who might be awarded access to the files by a court, without reliance upon the Act." *Hodgson v. General Motors Acceptance Corporation,* 54 F.R.D. 445, 446 (S.D. Fla. 1972). Put succinctly, the difficulty with defendants' argument

> ". . . is that the Freedom of Information Act was enacted to provide the public with the right to obtain information from administrative agencies and agencies in the executive branch of the government; it was not enacted to provide discovery procedures for obtaining information during litigation. Put otherwise, the fact that §552(b) of the Information Act provides specified exemptions from the Act's public information requirements does not in and of itself create a judicial discovery privilege with respect to such exemptions. . . .
>
> * * *
>
> ". . . Clearly, the defendant cannot use an administrative exemption which specifically does not cover judicial discovery as a basis for claiming a judicial discovery privilege." *Verrazzano Trad-*

*ing Corp. v. United States,* 349 F.Supp. 1401, 1403 (U.S. Customs Court, 1972)."

See also *Pleasant Hill Bank v. United States, supra,* 58 F.R.D. at 99.

In support of their claim, defendants cite only the legislative history of the Act and the case of *Tarlton v. United States,* 430 F.2d 1351 (5th Cir. 1970). See Defendants' Response at 13. But this Court will read the legislative history in vain to find any indication that Congress meant to create any new privilege to be applied to civil discovery. And the *Tarlton* case merely holds that certain types of documents are "exempt from disclosure," Defendants' Response at 13, to *a member of the general public who seeks access to them under the Federal Information Act,* not to a litigant in a federal lawsuit. The point here, of course, is that "[e]ven if we posit, *arguendo,* that * * * documents are exempt from *disclosure,* it does not necessarily follow that they are privileged for purposes of civil discovery." *Pleasant Hill Bank v. United States, supra,* 58 F.R.D. at 99 (emphasis supplied). Thus defendants' attempt to transform *exceptions* to the Public Information Act (which withhold certain documents from the *general public*) into *privileges* under the Federal Rules of Civil Procedure (which would withhold the same documents from *litigants*) has been directly rejected by the commentators and by the courts. In the words of Professor Moore, "[t]he Act did not repeal the Rules of Civil Procedure, of course, and under the Rules there is no general principle that makes information otherwise discoverable privileged



because it was given in confidence." 4 Moore's Federal Practice, *supra,* ¶26.61 [4.-3] at 26-276.

By way of summary, then, plaintiffs' position may be stated as follows. *First,* that in federal question cases, such as this one, and especially in actions brought against state officials under Section 1983 to redress constitutional violations, state laws of privilege are not conclusively binding upon the federal courts; rather, such courts must make an independent determination which weighs and resolves the competing needs of the party seeking discovery and the party asserting the privilege. *Second,* that defendants have thus far never even *attempted* a showing that their claimed privilege applies, that it furthers any serious public policies, or that any potential harm from discovery could not be cured by a protective order. *Third,* that the strong public policies in favor of discovery in this type of lawsuit clearly outweigh any imaginable policies in favor of nondisclosure. And *fourth,* that defendants' attempt to create a privilege for prison records out of the *exceptions* to the Federal Public Information Act is manifestly erroneous as a matter of law.

If this position is correct, little time need be spent in dealing with defendants' claim of privilege under California law. However, to the extent that this Court does wish to consider that claim on the merits, plaintiffs will now show why no such privilege exists; or why, at the very least, any such privilege is a conditional one which requires the same balancing of competing considerations as does the Federal practice discussed above.

B. *Under California Law Defendants Can Assert No Valid Privilege*

1. *Section 1040(b)(1) of the California Evidnce Code and Section 6254 of the California Government Code do not Create a Privilege*

Section 911 of the California Evidence Code provides that the only privileges recognized by California law are those created by statute. In opposing discovery in this case, defendants rely partly upon Evidence Code Section 1040(b)(1), which provides in pertinent part that

> "A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
>
> (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; * * *"

Since this portion of the statute requires defendants to incorporate another state statute which forbids disclosure, defendants invoke Section 6254 of the Government Code, which contains certain exceptions to the California Public Information Act. In this way, defendants attempt to transform the usual exceptions to the *state* public information act into a judicial privilege, in exactly the same way as with the Federal Public Information Act. Such an effort, however, cannot succeed for the same reasons discussed in the preceding section of this memorandum.

In addition, we note that Evidence Code Section 1040(b)(1) requires defendants to invoke another



state statute which *forbids* disclosure; yet Section 6254 of the Government Code merely provides that nothing in the Public Information Act "shall be construed to *require* disclosure" of certain types of records (emphasis supplied). Indeed, Section 6254 explicitly provides that "[n]othing in this Section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law."[15] Therefore utilization of Government Code §6254 and Evidence Code §1040(b)(1) do not, even in combination, create an absolute privilege, since Section 6254 does "not impose an absolute prohibition on disclosure of the information in question." *Terzian v. Superior Court,* 10 Cal.App.3d 286, 294, 88 Cal.Rptr. 806, 813 (1970).

Equally explicit is the provision of Section 6260, to the effect that:

> "The provisions of this chapter shall not be deemed in any manner * * * to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state."

In construing this sentence, the legislative history states that "*[t]he laws of discovery, which are under-*

[15]And the legislative history of Section 6254 construes this sentence as placing "special emphasis upon the *need* to disclose records concerning the administration of a public agency unless specific prohibition against such a disclosure can be found in other sections of state and federal law." *See* Appendix to the Journal of the Assembly, Regular Session, 1970. Volume I at 11 (emphasis added). In other words, "[t]he responsible public official may make information available under this Section [§6254] but he is not required to do so under state law." *Id.* at 9.

*going evolutionary change in California, were not to be influenced by general records law"* (emphasis supplied). See Appendix to the Journal of the Assembly, *supra,* at 13 (emphasis supplied). Certainly it is difficult to know what Section 6260 may mean unless it means, *inter alia,* that the exceptions contained in Section 6254 do not create privileges "under the laws of discovery of this state."

Nor are the cases cited by defendants to the contrary for, like *Tarlton v. United States, supra,* they simply do not involve *litigants* in an already pending action seeking documents *through discovery.* Rather, they involve persons who have filed a suit in order to obtain the documents in question.[16] Hence these cases, like *Tarlton v. United States, supra,* and many other federal cases, stand for no more than the proposition that a state agency may refuse to make certain types of documents available to indiscriminate public inspection. They have nothing whatsoever to do with privilege.

### 2. *California Evidence Code Section 1040(b)(2) Does Not Create a Privilege*

Defendants also appear to contend that the *conditional* privilege created by Section 1040(b)(2) of the Evidence Code should apply to various documents in-

[16]See *Yarish v. Nelson,* 27 Cal.App.3d 893 (1972); *Alanis v. Superior Court,* 1 Cal.3d 784 (1970). Although the prisoner-petitioner in *Alanis* had purported to have filed a petition in the Superior Court to recall commitment and grant probation under Penal Code Section 1168, the court held that the prisoner had no right to institute such a proceeding. The third case cited by defendants, *In re Harrell,* 2 Cal.3d 675 (1970) simply does not consider the question of privilege or confidentiality.



volved in the instant motion to compel. However, as we have already pointed out, defendants have never even bothered to show (1) that the documents in question come within the statutory definition of "official information," (2) that disclosure of the information they contain "is against the public interest because there is *necessity* for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice;" or (3) that any real harm which might be caused by violating the confidentiality of the information could not be obviated by the entry of a protective order. Instead, defendants' position seems to be that by simply *citing* to Section 1040, the Attorney General of California may, without more, obtain the conditional privilege which it provides. Yet plaintiffs have already shown, in Section II of this memorandum, that a party resisting discovery has the clear burden of *showing* that any claim privilege *in fact applies* to any given document or interrogatory. Since defendants have not attempted to make the requisite showing, their claim of privilege under Section 1040(b)(2) must be rejected.

## VII

### Since Defendants' Opposition to Plaintiffs' Discovery Requests Are Without Substantial Justification, Plaintiffs Are Entitled to an Award of Expenses Incurred in Obtaining an Order Compelling Discovery

In 1970 the language of Rule 37(a)(4) was changed, so that it now provides that if a motion to compel discovery is granted, the court shall

> "require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorneys' fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

As a result of this change, "[t]he burden of persuasion is now on the losing party to avoid assessment of expenses and fees rather than, as formerly, on the winning party to obtain such an award." 8 Wright & Miller, *supra,* at 798. Opposing a discovery motion is substantially justified

> "if the motion raised an issue about which reasonable men could genuinely differ on whether a party was bound to comply with a discovery rule. The mere fact that the party was acting in good faith is not substantial justification if there was no fairly litigable issue." 8 Wright & Miller, *supra,* at 790.



This rule—as well as the purpose of shifting the burden to the losing party—was intended to encourage a wider use of the award of expenses in order to discourage frivolous requests for or objections to discovery, and thus to discourage unnecessary recourse to the courts. 8 Wright & Miller, *supra,* at 786; 4A Moore's Federal Practice, *supra,* ¶37.02[10].

In the case at bar, it simply cannot be said that defendants' objections are substantially justified; to the contrary, many are so specious as to constitute an affront to this Court and to the entire discovery process. In most cases, as this Court is well aware,

> "counsel of the competence of counsel engaged in this case rarely find it necessary to resort to motions for protective orders because both sides recognize that the question presented is not whether documentary data is going to be ordered produced, but when, how, and in what form, such production will be ordered. (Footnote omitted). *Apco Oil Company v. Certified Transp. Inc.,* 46 F.R.D. 428, 431 (W.D. Mo. 1969).

In this case, however, defendants have submitted numerous incomplete and evasive answers; have refused to make any showing whatsoever that their objections were justified; have interposed relevancy objections with respect to material which goes to the heart of the case; have interposed objections to documentary data based upon a claim of undue burden which ignores the legal standards developed by the courts; have professed an inability to understand simple requests as unduly vague; and have invoked numerous claims of privilege which are without merit.

Surely there comes some point at which a presumption of good faith disappears, and the only conclusion that reasonable men can draw is that an answering party, in responding to discovery requests, "knew all too well what documents were wanted and did not want to produce them." Such a reluctance is at least understandable. What is not so understandable, however, is why defendants believe that this Court will look kindly upon such a patently obvious attempt to at best delay and at worst prevent the development of crucial evidence to which plaintiffs and this Court are entitled. Especially is this so where, as here, defendants have unjustifiably delayed the case in the past, and where this Court has adopted a timetable pursuant to which all discovery is to be completed by June 15, 1974.

Accordingly, plaintiffs suggest that a strong order to compel the discovery requested, together with a liberal award of expenses to plaintiffs, should be issued forthwith. If it is, we may, in time, get to the underlying evidence which will secure a "just, speedy, and inexpensive determination" of this action. See Rule 1, F.R.Civ.P. If it is not, defendants will surely continue—and escalate, if that is possible—their dilatory and obstructive tactics, to the end that the remainder of this case will perforce be largely "carried on in the dark." *Hickman v. Taylor,* 329 U.S. 495, 500 (1947).



## Conclusion

For all of the foregoing reasons, plaintiffs' motion to compel discovery and for an award of expenses should be granted.

Dated: March 6, 1974.

B. E. Bergesen, III
Fay Stender
Sidney M. Wolinsky

/s/ B. E. Bergesen, III
Attorneys for Plaintiffs

[Appendix A]

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With respect to those Rule 33 and Rule 34 requests to which defendants have objected, either in whole or in part, plaintiffs make the following response.

I. *Rule 34 Request for Production of Documents.*

*No. 1*

Since California Penal Code Section 2081.5 does not *forbid* disclosure of these files, there is no absolute privilege against disclosure pursuant to California Evidence Code Section 1040(b)(1). Nor, as may be seen from pages 22-37, *supra,* is there any other privilege which would prevent this Court from ordering the disclosure of these files. The contents of these files are obviously the best evidence as to what actually happened to the named plaintiffs with respect to action taken on their cases by the Adult Authority. This Court ordered that discovery be made of identical files in the case of *Charles v. Patterson,* No. C-71 1337 SAW (N.D. Cal.), not only of the named plaintiffs but also of certain other named inmates of Deuel Vocational Institution. Since these files are not privileged, but are highly relevant, they should be produced in their entirety.

*No. 2*

No reason is given for limiting the material to be produced to certain official documents of the Adult Authority. If there are no other documents in existence, defendants should so state; if there are, defend-



ants should either state that they will be produced, or interpose a specific objection thereto. Similarly, if defendants have identified documents which are privileged under California law, they should submit a list of said documents and state the ground of the purported privilege as to each. See *Pleasant Hill Bank v. United States,* 58 F.R.D. 97 (W.D. Mo. 1973). However, it is plaintiffs' position that no such documents could be privileged, see pages 22-37, *supra,* and therefore production of these documents should be ordered forthwith.

*No. 3*

Defendants purport to be "unable to determine from the description of the request if any such documents exist * * *." Interestingly, an almost identical request was made in the case of *Taylor v. Breed,* No. C-70 1522 OJC (N.D. Cal.), and the Deputy Attorney General representing defendants had no difficulty in understanding the question and submitting a response thereto. In any event, the request is quite clear on its face, and defendants' alleged inability to understand it should be overruled.

*No. 4*

Defendants apparently misunderstand the request, which does not refer to the hearings conducted by panels of Adult Authority members or hearing representatives, but rather to the meetings of Adult Authority members held in Sacramento to discuss matters of policy. Therefore defendants' basis for invoking a privilege is infirm. Moreover, there is no valid privi-

lege under California law which would apply to these documents. See pages 22-37, *supra.*

*No. 5*

Plaintiffs consider it quite extraordinary that even indices of tables of contents with respect to the Adult Authority's files are considered "privileged". Although defendants may be unable to "perceive the relevance of these items" it should be quite apparent that they would furnish an invaluable guide to the documents in the possession of the Adult Authority, many of which might be obtained by plaintiffs pursuant to another Rule 34 request.

*No. 6*

This item is discussed fully at pages 13-14, *supra.* Suffice it to say at this point that it is an excellent example of the patently specious nature of many of defendants' objections to plaintiffs' Rule 34 request.

*No. 7*

Defendants apparently do not contest the obvious relevance of this request, but simply assert a privilege purportedly based upon the exceptions to the California Public Information Act. This issue is discussed at pages 22-37, *supra.*

*No. 9*

During his deposition, Mr. Kerr (formerly the Chairman, presently a member, of the Adult Authority) was asked if he maintained a file which contains some speeches and statements which he had delivered



to private groups or governmental bodies, to which he replied "I am sure my secretary does." See Kerr Deposition at 31. Therefore, at least to the extent that Mr. Kerr is concerned, it would seem that defendants *do* possess the material requested. If for some reason Mr. Kerr's deposition is inaccurate, such an allegation should at least be made in defendants' response.

*No. 10*

Plaintiffs believe that the language of Request No. 10 is couched in language which a person of ordinary intelligence could easily understand, and therefore does describe the items requested with sufficient particularity. Beyond that, defendants seem to have fashioned a classic Catch-22 response by alleging that, on the one hand, the request is not limited to matters relevant to the subject matter of the instant case, but, on the other hand, "defendants should not be put to the burden of determining what, in the plaintiffs' view is relevant." This is a specious response, and it should be overruled by the Court. Defendants' statement that to the extent they "can identify material sought by this request which exists," does not save this response, since it does not forthrightly state whether or not the documents called for exist, and if so, whether or not they will be produced.

*No. 12*

Again, plaintiffs believe that the request is quite self-explanatory and could easily be met by defendants in good faith. So far it is defendants' claim of insufficient particularity is concerned, see pages 20-22,

*supra.* Again, defendants' equivocal statement that to the extent that they can determine from the request which statistics are relevant, they will be made available, is clearly an insufficient response.

*No. 13*

Again, defendants interpose a patently specious objection based upon the supposed vagueness of the request, based upon the curious notion that "defendants should not be put in a position of having to determine which documents this request pertains (sic)." See pages 9-10, *supra.*

*No. 14*

Again, the request itself is quite clear. So far as privilege is concerned, see pages 22-37, *supra.*

*No. 15*

Defendants' objection is based upon privilege; see pages 22-37, *supra.*

*No. 16*

The objection to this request apparently goes to relevancy. If plaintiffs show that the present system utilized by the Adult Authority is unconstitutional on due process grounds, a key issue will be what minimal procedural safeguards are required by the Constitution, and just how they should be structured. At this point, the question of expense may well be relevant, in which case a detailed breakdown of the Authority's budget would appear to be quite relevant.



*No. 17*

Again, defendants' objection on grounds of irrelevancy or insufficient particularity is specious on its face. Of course, defendants are not required to produce documents which are not in their possession, custody or control; if, however, copies of these documents are in their possession, custody or control, then they clearly must be produced, whether or not other persons or organizations, not parties to this suit, also possess them. Therefore, defendants' suggest that plaintiffs proceed in accordance with Rule 34(c) is entirely beside the point. Once again, defendants' equivocal statement that some material may be produced is not sufficiently forthright to meet the requirements of Rule 34. And, with respect to privilege, see pages 22-37, *supra.*

*No. 18*

The obvious relevancy of this request is that the material requested may well substantiate some of the allegations contained in plaintiffs' complaint to the effect that present procedures are constitutionally infirm. All of defendants' objections based upon insufficient particularity or vagueness are good examples of the types of answer which makes it particularly appropriate for plaintiffs to be awarded the expenses reasonably incurred by them in obtaining an order to compel, as provided by Rule 37.

*No. 19*

By definition, plaintiffs cannot and do not ask for material which is not within the possession, custody or

control of defendants. So far as privilege is concerned, see pages 22-37, *supra*. The material is obviously relevant, since these articles may well contain important information concerning the operation of the Adult Authority, and would therefore be, at the very least, reasonably calculated to lead to admissible evidence.

*No. 20*

There is no need for defendants to make a relevancy determination with respect to any given memorandum, since plaintiffs are quite willing to assume that task. So far as privilege is concerned, see pages 22-37, *supra*.

*Nos. 21, 22*

Defendants' objection to each of these requests, based solely upon privilege, is met at pages 22-37, *supra*.

II. *Plaintiffs' Rule 33 Interrogatories*

Although each defendant submitted a separate set of answers to these interrogatories, many answers to specific interrogatories are couched in identical language. This is true, for example, of Interrogatories No. 1 through 4, among others. Where such duplications exist with respect to interrogatories which are included in the instant motion to compel discovery, reference will often be made to the objection submitted to the same question by another defendant. Specifically, the following comments with respect to Interrogatories No. 1 through 4 are to be applied to each



defendants' answer. Thereafter, comments with respect to Interrogatories No. 12 through 39 pertain to the answers submitted by defendant James H. Hoover. Following the comments concerning defendant Hoover's answers, comments will be made upon the answers submitted by each additional defendant; however, in the interest of brevity, reference will usually be made to either an answer submitted by defendant Hoover (where applicable), or to an issue of law discussed in the foregoing legal memorandum.

*No. 1*

Taken literally, the fact that questions may be "harassing" or "an unnecessary invasion of privacy" simply do not state valid grounds for objecting to discovery under the Federal Rules of Civil Procedure. To the extent that the question may be "oppressive", whatever that term may mean, it is plaintiffs' suggestion that the various types of protective orders suggested in Rule 26(c) (in which the term "oppressive" appears), other than the extreme order that discovery not be had, would be appropriate to protect any valid interest of an individual defendant. To the extent that defendants are complaining about an undue burden, see pages 16-20, *supra*. So far as relevancy is concerned, it has always been the position of the Adult Authority that the special "expertise" possessed by Adult Authority members constitutes a subatantial reason why due process safeguards should not apply. Plaintiffs, however, in their complaint, have alleged that Adult Authority members not only have no such

expertise, but are in fact extremely unsuited to their tasks, and thereby contribute to the constitutional infirmities which these procedures entail (see pages 14-15, *supra*). Therefore the information requested in this Interrogatory is highly relevant to the suit.

*No. 2*

Again, the fact that a person answering an interrogatory is "not the best source of information requested," or that the hearing representatives are not parties to the litigation and therefore not subject to interrogatories, are simply not valid grounds, under the Federal Rules of Civil Procedure, for not submitting answers; the same may be said concerning objections based upon supposed harassment or invasion of privacy. So far as relevancy is concerned, see plaintiffs' discussion of Interrogatory No. 1, *supra*.

*No. 3*

The information requested here is highly relevant, on two separate grounds. *First,* it may well be that material written by a member could be introduced into evidence in order to document various defects in the present procedure followed by the Authority. *Secondly,* it might well furnish important information which will in turn lead to other information which would be admissible at trial. Certainly it cannot be denied that Adult Authority members are quite knowledgeable about the procedures which they themselves have established and purportedly follow, and therefore plaintiffs do not understand defendants' reluctance to furnish this information.



*No. 4*

In this interrogatory, plaintiffs are attempting to discover what familiarity, if any, individual Adult Authority members have with various officials and organizations who play, or who might play, influential roles in parole release/revocation decisions. It also appears curious that defendants refuse to answer Interrogatory No. 4, but at the same time agree to answer Interrogatory No. 5, which seeks the same type of information. How this question can be considered unduly vague on the one hand, or oppressive and harassing, on the other, does not appear from defendants' answer, nor from any common sense consideration of the task of answering this particular interrogatory.

*No. 12*

The answer is unresponsive, inasmuch as it does not state whether or not the files—which were "available" for consideration by the panel—were in fact considered.

*No. 14*

The interrogatory asks for a specific answer with respect to how particular inmates were notified of a hearing. Instead of answering the question, defendant Hoover's answer speaks in terms of how inmates are "typically" notified. The answer is, therefore, not responsive.

*No. 15*

Again, the answer is not responsive; the Forms CDC-279 attached do not state the substance of the discussion, as requested in the interrogatory.

*No. 16(b)*

The Form CDC-279 and the attached policy statements do not set forth the criteria in fact used by the Adult Authority members in determining the period for which parole consideration was to be postponed in the case of Robert Newton Gardner.

*No. 18*

Again, the interrogatory asked for whether and when a decision was in fact conveyed to certain officials, whereas the answer is couched entirely in terms of how such a notification is "typically" done. Therefore the answer is insufficient.

*No. 19*

The Forms CDC-279 which are attached, while providing some insight, do not present a complete arswer, nor does a list of items which Adult Authority members sometimes consider cure this defect.

*No. 20*

Again, the question is largely answered by a statement concerning what is "typically" done, and therefore is unresponsive.

*No. 27*

This question is framed in terms of the particular offense that would justify more or less time of actual imprisonment, whereas the answer (identical to the answer supplied by all defendants to this interrogatory) is phrased in the broadest and most general terms, and is therefore unresponsive to the question.



*No. 31*

The answer is not responsive, because it does not treat the specific benefit which the Adult Authority believed to exist in the specific case of Robert Gardner.

*No. 38*

The question asks what role certain information played in the Adult Authority's decision. The answer simply lists a few documents which were received and placed in the file of one of the three inmates about whom the interrogatory is concerned, and it is therefore both unresponsive and incomplete.

*No. 39*

Defendants' objection, on the ground that the interrogatory is "oppressive", is obviously raising the allegation of undue burden. However the objection, on its face, indicates that defendants' concept of undue burden is not in accord with that developed by the commentators and the courts. See pages 16-20, *supra*. An answer should be compelled.

*Answers of Defendant Walter A. Gordon*

*No. 14*

See Hoover No. 14.

*No. 15*

See Hoover No. 15.

*No. 16*

See Hoover No. 16.

*No. 17*

See Hoover No. 17.

*No. 18*

See Hoover No. 18.

*No. 27*

See Hoover No. 27.

*No. 39*

See Hoover No. 39, and discussion of "undue burden" in the foregoing legal memorandum.

*No. 41(b)*

Regardless of the outcome of plaintiff Chatfield's litigation referred to in this answer, the action taken with respect to his parole revocation by defendants herein remains of extreme relevance to this case from an evidentiary standpoint. For if it can be shown that such action in fact supports some of the allegations contained in plaintiffs' complaint, it would surely be admissible in support of those allegations. At the very least, the information called for appears reasonably calculated to lead to admissible evidence, and therefore defendant Gordon should be compelled to answer this Interrogatory.

*Answers of Defendant Curtis O. Lynum*

*No. 27*

See Hoover No. 27.



*No. 41(b)39*

This answer does not respond fully to the question asked; defendant Lynum should be directed to set forth all adverse reports.

*Answers of Defendant Daniel R. Lopez*

*No. 14*

See Hoover No. 14.

*No. 27*

See Hoover No. 27.

*No. 31*

Not a full and complete answer to the question.

*No. 34*

Not a complete answer with respect to Mr. Gardner.

*No. 35*

Not a complete answer to the question with respect to Mr. Gardner.

*No. 38*

This answer is simply not responsive to the question, which asked what role the information referred to played in the Adult Authority's decision.

*No. 39*

A good example of defendants' misunderstanding of the objection based upon *undue* burden. See page 20, *supra,* of plaintiffs' legal memorandum.

*No. 41(a)39*

This answer is incomplete, since it does not treat the "many reports and comments which may be categorized as adverse."

*Answers of Defendant Leland M. Edman*

*No. 27*

See Hoover No. 27.

*No. 31*

Answer is not responsive to the question.

*No. 38*

The answer is not responsive to the interrogatory.

*No. 39*

The answer is superficial and does not completely answer the interrogatory.

*No. 41(a)39*

The response does not fully answer the question, which asks what role the reports in question played in the decision reached by the Adult Authority.

*No. 41(c)9*

Since Mr. van Geldern did not appear at the en banc hearing in May of 1972, the balance of the questions through question 40 are not inapplicable, as here contended by defendants.

*No. 41(d)39*

The question has not been completely answered.



*Answers of Defendant Charles E. Brown*

*No. 14*

The answer does not state how the inmate was in fact notified, as requested by the interrogatory, but rather only what "the practice is" with respect to notifying inmates of hearings.

*No. 17*

Again, defendant does not say what in fact happened, but rather what "typically" happens with respect to notifying inmates of the Adult Authority's action.

*No. 19*

Again, there is no description of what factors were in fact considered with respect to each named plaintiff, but rather only a generalized answer to the effect of what factors are typically considered by a panel in fixing a term.

*No. 27*

Again, a generalized answer is given, rather than a specific answer keyed to the named plaintiffs in question.

*No. 39*

Defendant Brown, like some other defendants, misconstrues the law with respect to "undue burden", and he should be directed to answer this interrogatory forthwith. In passing, it is noted that some of the defendants (e.g., defendant Edman), did answer this question, and were therefore not deterred by the

necessity of exercising "speculative judgment", or "an oppressively significant amount of time" in submitting an answer.

*No. 41(d)*

See Gordon No. 41(b).

*Answers of Defendant Raymond Procunier*

*No. 10, 11, 12*

Defendant Procunier's misunderstanding of the concept of "undue burden" has already been discussed in the legal memorandum, *supra,* at page 19. Following the legal principles enunciated in Section IV of the memorandum, *supra,* defendant Procunier should be directed to answer these interrogatories.

*No. 14*

The question asks how particular inmates were notified; the answer goes only to how inmates are "typically notified", and therefore a specific answer should be directed.

*No. 39*

Again, defendant Procunier misconceives the law on the subject of undue burden and expense, as discussed in Section IV of the memorandum. Accordingly, he should be directed to answer this interrogatory.

*Answers of Defendant Joseph A. Spangler*

*No. 10, 11, 12*

Again, there is no "undue burden" in answering these interrogatories, and therefore answers to them should be directed.



*No. 13*

Interrogatories are to be answered if the answers may be found in the records in the possession, custody or control of the defendant to whom the interrogatory is addressed. See discussion of the law in Section I, *supra.* Therefore, defendant Spangler should be directed to answer this question.

*No. 14*

The question asks for a specific answer couched in terms of particular inmates; the answer is couched in terms of how inmates are "typically notified," and therefore a direct, responsive answer should be ordered.

*No. 15, 16*

See comment with regard to Interrogatory No. 13, *supra.*

*No. 17*

Again, specific facts are requested, whereas the answer is couched in terms of what "typically" happens. A responsive answer should be required.

*No. 19*

See comments with regard to Interrogatory No. 13, *supra.*

*No. 20*

A specific answer is requested, whereas the answer is couched in terms of what "typically" happens.

*No. 21-38*

See comment with respect to Interrogatory No. 31, *supra*. Defendant Spangler should be directed to answer all of these interrogatories.

*No. 39*

As with many other answers to Interrogatory No. 39, defendant here misconceives the law with respect to "undue burden" and therefore he should be required to answer it.

*No. 41*

Generally, defendant Spangler should be directed to answer all of these interrogatories as to which he has personal knowledge, or as to which relevant information is maintained in records over which he has possession, custody or control.

[Proposed Order Omitted in Printing]

[Certificate of Service Omitted in Printing]



United States District Court
Northern District of California

[Filed March 25, 1974]

[Title Page, Topical Index, Table of Cases and Captions Omitted in Printing]

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS.

Defendants oppose plaintiffs' motion to compel answers to interrogatories and production of documents for the reasons stated below:

*Preliminary Statement*

". . . Plaintiffs are obliged to present evidence concerning all of these various components of the parole system in order to sustain their burden of proof at trial; and defendant's objection to relevance must therefore be received in the context of these wide-ranging factual allegations." (Plaintiffs' memo Points and Authorities in Support of Motion, p. 12:24-28.)

The action does not support this premise for plaintiffs' discovery demands: It does not concern the parole *system,* but concerns only the particular proceedings which are designated by the named plaintiffs and which affected them. The only concern is whether these plaintiffs were denied due process in these proceedings.

For the reasons which follow, defendants' objections should be taken in this context and not in the "wide-ranging" context advanced by plaintiffs.

A. *The nature of the action:*

This is a civil rights action which demands federal equity intervention to impose newly developed procedures on particular past state correctional proceedings conducted during the 18 months period from December, 1970, to June, 1972. The rights and procedures demanded have since been established, in other litigation, with prospected effect from June, 1972, but had been considered and rejected by the federal courts in this circuit for the period in question.

Plaintiffs are seven state prisoners, four of whom have been paroled since this action commenced.[1] Defendants are the Director of Corrections, members of the Adult Authority, and the chief administrative officer of the Authority.

The complaint seeks mandatory injunctive relief to impose on proceedings held between December 1970 and June 1972 a proposed set of new procedural safeguards.[2] Many of the rights and procedures demanded

[1]Van Geldern was parole to Hawaii in August, 1973; Murrin was parole in August, 1973; Lewis was paroled in December 1972; Gardner was paroled in November, 1973.

The complaint also purports to commence a class action on behalf of all adult male state prisoners incarcerated or on parole. However, no attempts has been made during the 16 months since the complaint was filed to move the court to determine whether it is to be so maintained. Fed. Rule Civ. Proc. 23(e).

[2]The complaint asserts the following rights existed at the following *past* proceedings: (A) *Rights:* counsel; production of favorable witnesses; confrontation and cross-examination of adverse witnesses; discovery; a reporter's transcript of the proceedings; the challenges for cause of hearing officers; a written decision stating the reasons for decision and the evidence relied on. (B) *Proceedings:* parole granting; parole rescission; parole suspension and revocation; sentence fixing; sentence refixing; serious disciplinary proceedings.



have since been established, but with prospective effect from June 1972.[3] Insofar as the earlier period is concerned, the Court of Appeals for the Ninth Circuit had frequently and consistently rejected the rights asserted by plaintiffs in this action.[4] Plaintiffs nevertheless persist with the instant action and make the broadest possible demands for discovery. Plaintiffs insist the information demanded is needed to support their allegations, but expressed no consideration of whether their allegations are necessary to sustain the manded. Defendants, of course, have no control over what plaintiffs wished to allege in their complaint.

Plaintiffs assert that because Judge Weigel has denied defendants' motion to dismiss, he has also held that plaintiffs' allegations, if true, warrant the relief demanded. This assertion is supported neither by the

[3]The following rights have been established since the occurrence of the proceedings to which the complaint makes specific reference: counsel, confrontation, cross-examination of adverse witnesses, presentation of favorable witnesses, notice, discovery, a written decision stating the reasons for decision and the evidence relied on. *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); *In re Prewitt,* 8 Cal.3d 470, 105 Cal.Rptr. 318 (1972). The above cases relate to proceedings resulting in parole revocation, parole rescission, and sentence fixing and refixing. The same rights are imposed on serious disciplinary proceedings by *Clutchette v. Procunier,* 328 F.Supp. 767 (N.D. Cal. 1971), appeal pending *sub non Procunier v. Clutchette,* CCA-9, No. 71-2357. These rights with respect to serious disciplinary proceedings are also pending in litigation before the United States Supreme Court in *Wolff v. McDonald,* No. 73-679, October, 1973.

[4]*Dorado v. Kerr,* 454 F.2d 892 (9th Cir. 1972); *Ellhamer v. Wilson,* 445 F.2d 856 (9th Cir. 1971), *cert. den., sub non Hinnington v. California Department of Corrections,* 405 U.S. 997 (1972); *Lincoln v. Adult Authority,* 435 F.2d 133 (9th Cir. 1970); *Mead v. California Adult Authority,* 415 F.2d 767 (9th Cir. 1969); *Dunn v. California Department of Corrections,* 401 F.2d 340 (9th Cir. 1968); *Williams v. Dunbar,* 377 F.2d 505 (9th Cir. 1967).

record nor by law. Judge Weigel's denial of defendants' motion to dismiss was made without explanation. Accordingly, this decision reasonably shows no more than that the complaint on its face, and liberally construed in favor of plaintiffs, may state a cause of action as it reads or as it may be reasonably amended to read. Indeed, the complaint includes two types of allegations: the first type refers to some ten specific correctional proceedings each of which affected one of the defendants (these appear to be the proceedings referred to in Interrogatory No. 41); and the second type of allegation makes sweeping reference to the parole system and to the personal qualifications of the members of the Adult Authority. Judge Weigel's denial of defendants' motion to dismiss does not amount to a recognition of every allegation in the complaint and may well be assumed to refer to the more narrow allegations respecting the ten particular proceedings which affected the named plaintiffs.

Indeed, with respect to plaintiffs' sweeping allegations which attack the entire parole system, it would appear that plaintiffs entitlement to the relieve demanded would and perhaps should have little or no dependency on them. Speaking in the abstract, and putting aside for the moment the legal merits and problems of retrospective effect, the relief demanded by plaintiffs could be granted even where each of plaintiffs sweeping allegations determined to be false or without support. In *Morrissey v. Brewer, supra,* and in *Gagnon v. Scarpelli, supra,* expansive new due process rights were established for parole hearings.



Not only did these opinions find it unnecessary to declare the existing system corrupt, unreliable, or biased, but they established the new rights in the fact of generally complimentarily findings.

It bears repeating that this action concerns only past correctional procedures and will furnish no informational basis for the court to mandate future correctional procedures. As a result of *Morrissey, Scarpelli, Prewitt,* and a host of other state cases and state administrative actions, California's correctional procedures have been completely revised in favor of providing safeguards such as are proposed by plaintiffs in this action.[5] Plaintiffs' action limits the court to pre-*Morrissey* conduct. (Plaintiffs' opposition to defendants' motion to dismiss, p. 5, fn. 3; plaintiffs' opposition to defendants' notice of related cases, p. 1-2.) To litigate the rights demanded by plaintiffs on the basis of this past conduct, no longer followed by the Adult Authority, would be similar to litigating new federal discovery questions on the basis of conduct and authorities predating the adoption of the new federal procedures in 1938. The changes in California's correctional procedures which have been generated by *Morrissey* and the cases following it are no less comprehensive or dramatic than the changes in federal procedures since the adoption of the new rules.

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[5]A comprehensive description of these new state procedures, including some 47 Exhibits, was filed in *Prisoner's Union v. Kerr,* No. C-72-1748 ACW, U. S. Dist. Ct. - No. Dist. Cal. in January, 1974. The *Prisoners Union* case is also an action for mandatory injunctive relieve and does involve *current,* not past, parole procedures.

B. *The nature of the discovery demanded by plaintiffs:*

The interrogatories select 17 correctional proceedings which directly affected the seven named plaintiffs. Seven of these proceedings occurred during the period of November, 1972, to February, 1973 (Interrogatories No. 6-40). Nine of the other ten proceedings occurred during the period during December, 1970, to May, 1972, and one proceeding, a rescission of James Murrin's parole, occurred in September, 1972. These ten earlier proceedings are the subject matter of Interrogatory No. 41.[6]

Plaintiffs complaint, however, makes no reference whatsoever to the actions designated by Interrogatory No. 6 and sought to be investigated and Interrogatories Nos. 7-40. Not only did the complaint not refer to these latter proceedings, but plaintiffs' subsequent documents filed in the action confirmed that the complaint intentionally refers exclusively to conduct occurring before *Morrissey v. Brewer, supra,* decided June 1972. Furthermore, as noted above (fn. 1, *supra),* although the complaint purports to commence a class action, plaintiffs have made no attempt during the intervening 16 months to move the court to declare this a class action.

For the above reasons, the action is presently limited to the ten proceedings designated in the complaint and in Interrogatory No. 41. What plaintiffs' envision

[6]Interrogatory No. 41 actually asks more than 310 questions. It incorporates Interrogatories 9 through 40 for each of the ten designated proceedings.



as a sweeping attack on California's correctional process is therefore nothing more than a joinder (see Rules 18 and 20, Federal Rules of Civil Procedure) of seven plaintiffs seeking review of ten particular correctional proceedings.

Plaintiffs' discovery demands, however, have not been limited in scope to the subject matter of the complaint. Interrogatories 1 and 2 demand detailed information about the personal lives of the defendants, their families, and about Adult Authority hearing representatives and their families. Interrogatory No. 3 demands detailed information on public utterances of members of the Adult Authority. Interrogatory No. 4 demands list of dates and places of any meetings of members with each of seven designated groups. Interrogatory No. 5 seeks such information respecting visits of members of each of four types of places.

Interrogatories No. 6 through 40 demand much detailed information respecting proceedings to which the complaint makes no reference. These are the post-*Morrissey* proceedings which occurred from November, 1972, to February, 1973.

Interrogatory No. 41 *(see* fn. 6, *supra)* asks about the proceedings mentioned in the complaint.

Interrogatories No. 42 through 44 ask about the Adult Authority internal review procedure, a matter not related to whether the ten proceedings mentioned in the complaint comported to applicable requirements of due process.

Plaintiffs demands for documents, etc., relate more to general correctional procedures and collateral activities of the defendants than to the particular proceedings which affected plaintiffs, and which are mentioned in the complaint.

## I

### Defendants' Objections Are Each Well Taken, And Are Made In Good Faith And Not For Purposes Of Delay Or Harassment

*Preliminary Statement*

Below we urge that federal civil discovery is not without bounds; that the demands to which defendants have objected exceed reasonable bounds of discovery either generally or under the circumstances of this case; that the reasonable bounds of discovery may properly be defined by balancing the value of the information demanded against the burden of producing it; and that with respect to the demands objected to by defendants, the burdens outweigh the value.

***The Federal Discovery Rules, while liberal, have limits, particularly in actions brought by prisoners against their custodian.***

The Federal Civil Rules of Discovery are not inflexibly liberal. The information demanded must be relevant to the subject matter of the action. Rule 26, Federal Rules of Civil Procedures.

Beyond relevance requirements, there are other restrictions. The liberal discovery procedure may not be used as a tactic to harass the opposition or to cause



it wasteful expense. *See, Armstrong Cord Co. v. Niagara Mohawk Power Co.,* 16 F.R.D. 389, 390-391 (Dis. N. Y. 1954). Demands which are "burdensome" or "oppressive" may properly be objected to in those terms. *Alexandra v. Rizzo,* 50 F.R.D. 374, 376 (D. Pa. 1970). Similarly, demands which are "vexatious," or cause "embarassment" may properly be objected to in those terms. *See, Burke v. Fire Underwriters, Inc.,* 21 F.R.D. 583, 584 (Dist. Mo. 1958). Immateriality is not an improper basis for objecting to discovery demands. *See, Berry v. Hayes,* 41 F.R.D. 243 (Dist. Fa. 1966).

As plaintiffs acknowledged (plaintiffs memo, p. 19), a basic rule is that discovery should be kept within bounds by weighing the value of the information sought against the burden of producing it. *United States v. R. J. Reynolds Tobacco Co.,* 268 F.Supp. 769, 774 (Dist. N. J. 1966). 4A Moores Fed. Prac., para. 33.20. Such balancing would seem especially appropriate where the court's equity jurisdiction is invoked.

Plaintiffs, however, assert that doubt must always be resolved in favor of allowing discovery. The liberality of federal discovery has evolved in the context of litigation involving such matters as anti-trust suits, patent infringement actions, and actions relating to personal injury or contracts and so on. It has not evolved in the context of civil rights litigation involving suits by prisoners against their custodians.[7]

[7]Plaintiffs' points and authorities for example cite 31 cases, only two of which are civil rights actions and neither of them involve a plaintiff in custody suing his custodians.

The liberality of federal discovery has been recognized as a weapon which may be used abusively:

> "The expense of [meeting discovery demands] becomes an abusive factor where one party is in a position to create a burdensome expense for the other without fear of the cost to himself. The situation arises for example, . . . where one party has so few facts that he has little to fear of retaliatory [discovery]." TACTICAL Use and Abuse of Depositions, 59 Yale L. Journal, 117, 127 (1949).
>
> "The likelihood of an adverse ruling, the delay involved, and the probable liability for all the expenses of the trip to court have discouraged deponents from seeking self-protection by refusing to answer questions they consider improper." *Ibid.,* at p. 124.

The potential for abuse is especially evident where plaintiffs are prisoners and defendants are their custodians:

> "We know from sad experience with habeas corpus and 2255 cases that imprisoned felons are seldom, if ever, detered by the penalties of purjury. They do not hesitate to allege whatever they think is required in order to get themselves even the temporary relief of a proceeding in court. The prospect of amercing their jailers in damages must be a most attempting one, even if it will not get them their freedom. A disruption of prison discipline that the maintenance of such suits, at government expense, can bring about, is not difficult to imagine. Particularly since *Monroe v. Pape,* 1961, 365 U.S. 167, 81 Sup.Ct. 473, 5 L.Ed.2d 492, it has become apparent that the 'jail house lawyers' think that they have a new bonanza in the Civil Rights Act." *Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir. 1963) (*Dunaway J.,* concurring).



One reason given by the United States Supreme Court for denying discovery in habeas corpus proceedings is the problems presented by the prisoner "plaintiff":

> "Except for interrogatories to be served by the 'plaintiff' within ten days after the commencement of 'the action' Rule 33 provides that the interrogatories may be served without leave of court. The 'adverse party' must then take the initiative to contest the interrogatories and a hearing in court on his objections is required. Unavoidably, unless there is a measure of responsibility in the originator of the proceeding, the 'plaintiff' or petitioner, this procedure can be exceedingly burdensome and vexatious. The interrogatory procedure would be available to the prisoners themselves since most habeas petitions are prepared and filed by prisoners, generally without the guidance or restraint of members of the bar. For this reason, too, we conclude that the literal application of Rule 33 to habeas corpus proceedings would do violence to the efficient and effective administration of the Great Writ. The burden upon courts, prison officials, prosecutors, and police, which is necessarily and properly incident to the processing and adjudication of habeas corpus proceedings, would be vastly increased; and the benefit to prisoners would be counterbalanced by the delay which the elaborate

discovery procedures would necessarily entail." *Harris v. Nelson,* 394 U.S. 286, 297 (1969).[8]

Also appropos are the following comments of the United States Court of Appeals for the Fifth and Fourth Circuits:

> "It is easy to say that some character of federal hearing must be had to determine whether these conclusory allegations are supportable. But to apply mechanically procedural rules appropriate to an ordinary damage suit to the situation of prisoner-parole problems imperils the parole structure and its beneficient aims. With unrestricted access to the nearest Federal Court and the ease with which denial of broad constitutional claims can be asserted, the prison-parole authorities might have to answer almost daily the complaints of numberless prisoners dissatisfied with the progress or lack of progress with their current requests. Federal Courts must, of course, be open to prisoners. But unless access to a Court is to become an illusion from the judicial system being powerless to act from the sheer volume of such claims, we must be certain when importuned to interfere that the complaint realistically read shows arbitrary action constituting abuse of administrative discretion." *United States Board of Parole v. Merhige,* 487 F.2d 25, 29 (4th Cir. 1973); *Scarpa v. United States Board of Parole,* 477 F.2d 278, 283 (5th Cir. 1973) (Brown, J., concurring) vacated on other grounds, *Scarpa v. United States Board of Parole,* ..... U.S. ....., 38 L.Ed.2d 44 (1973). The order vacating and remanding did not effect the analysis quoted above. *United States Board of Parole v. Merhige, supra,* 487 F.2d at 30.

[8]Although the court quoted above refers to 't'he guidance or restraint of members of the bar" as a possible safeguard against abuse, little or no such restraint has been exercised in the instant action.



All of the above applies to this action. Discovery here is a one-way street; defendants have no interest in retaliatory discovery, and little interest in any discovery from plaintiffs; plaintiffs have escaped the restrictions of 28 United States Code section 1915(d) [compare *Weller v. Dickson, supra*] by the simple expedient of paying a nominal filing fee; they have avoided the restrictions on discovery in habeas corpus actions [compare *Harris v. Nelson, supra*] by refusing to ask for the more prompt, complete, and adequate remedies thus available on the same allegations; they have made the broadest possible conclusory allegations and claim a right to discover all things which may relate to the allegations; they have demanded intensely personal information of the defendants with no more justification than a recital of the liberality of the federal rules and the possibility that some of the information may be of some use in preparing for trial.

Plaintiffs have deposed defendant Kerr for two days. The transcripts of this deposition cover 243 pages and close with counsel's comment: "At this time we are done with Mr. Kerr. But I would like to add that this doesn't mean that at some future time, . . . we might not want to take a second deposition of Mr. Kerr." On March 11, 1974, we received notice of coun-

sel's intent to depose the defendant Hoover: "The oral examination will continue from day to day until completed."

Plaintiffs' interrogatories ask over 500 questions, most of which were answered to the satisfaction of counsel.

Plaintiffs' motion to compel further discovery nevertheless forsakes none of the questions. For example, plaintiffs insist that the defendant Spangler answer interrogatory No. 13,[9] even though this interrogatory was answered fully by the actual participating members, and even though plaintiffs have found no fault in those answers. Such a demand of Mr. Spangler, who did *not* participate, is clearly not a search for truth as counsel would have it, but is a blatant attempt to harass Mr. Spangler and to needlessly burden defendants with redundant demands.

Plaintiffs' discovery demands, and their motion to compel, thus confirm the possibility of abuse in prisoner-custodian litigation. In view not only of the threat but also the actuality of such abuse, we are not impressed by plaintiffs' frequent and strident references to how liberally the federal courts have construed their rules of discovery.

We turn now to plaintiffs' motion to compel further answers to their Rule 33 interrogatories.

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[9]Interrogatory No. 13 reads as follows: "In the cases of each of the named plaintiffs referred to in interrogatory No. 6, if the action of the Adult Authority was to deny or delay parole, state the reason or reasons for the Authority's action."



## II

### Defendants' Objections Are Each Well Taken, And Are Made In Good Faith And Not For Purposes Of Delay Or Harassment.

*Interrogatory No. 1:* Plaintiffs move to compel each defendant to answer No. 1 in its entirety. Part (a) of the question was answered, parts (b) through (l) were objected to and not answered. The objections were on grounds of harassment, oppressiveness, invasion of privacy, irrelevance, and immateriality.

As noted above in our general discussion, these are proper grounds for objecting to interrogatories.

Interrogatories which harass, oppress, or invade privacy are burdensome. The burden cast by No. 1 is not in collecting the information but is in furnishing it to plaintiffs. Defendants' reluctance to furnish this information is not borne of any intent to withhold from counsel or from the Court the truth. Plaintiffs' points and authorities seem to assert that no burden exists unless it is in the collection of information demanded and then only where the task is awesome such as where millions of documents are involved. See plaintiffs' points and authorities, pp. 16-20, and particularly their reference to *Alexander v. Rizzo,* 50 R.F.D. 374 (E.D. Pa. 1970). Less awesome burdens, however, are recognized by the courts as justifying denial of discovery. See *United States Board of Parole v. Merhige, supra,* 487 F.2d at 29.

Of what value is the information sought in interrogatory No. 1? Plaintiffs insist the information is

needed to support their allegations that the Adult Authority members lack expertise and are incompetent. Defendants submit (a) that their expertise has no bearing on whether the designated proceedings affecting the named plaintiffs comported to applicable requirements of due process; (b) that the information sought in interrogatory No. 1 has no bearing on defendants' expertise. Accordingly the information sought is both irrelevant and immaterial. In the balance, the possible cognizable benefits the information sought is far outweighed by the burden of production and disclosure of the information to plaintiffs.

Due process depends neither on the personality nor the capabilities of the officer presiding over the hearing. Does a criminal defendant have rights to counsel and to confront and cross-examine, and so on, only before a "prosecution-minded" judge but not before a "defense-minded" judge? Plaintiffs need not prove and the Court need not find that the Adult Authority members, or any of them, lack expertise or are incompetent, in order to make a determination of whether plaintiffs are entitled to the relief they demand.

*Interrogatory No. 2:* All of our comments above with respect to interrogatory No. 1 apply with greater force to the information demanded by interrogatory No. 2. It is no more appropriate for plaintiffs to demand personal information of other correctional personnel not a party to the litigation than it would be for plaintiffs to demand information respecting other ate prisoners not a party to this litigation. See



*United States Board of Parole v. Merhige, supra,* 487 F.2d at 29. Interrogatory No. 2 does not even limit itself to hearing officers who may have participated in the designated actions which affected the named plaintiffs: the question demands the information of every hearing representative.

The expertise of the hearing representatives is less relevant even than the expertise of the members of the Adult Authority, and the information sought has little or no bearing on their expertise anyway.

Plaintiffs insist that defendants cannot object to these questions on the grounds that the hearing representatives are not parties and are not themselves subject to interrogatories. By not making the hearing representatives parties to the action and addressing the interrogatories directly to them, defendants have precluded the hearing representatives from raising the objections on their own behalf. Moreover who is to answer under oath these questions respecting intensely personal data on the hearing representatives? Are the Adult Authority members, or the Director of Corrections, or the Chief Administrative Officer to go out and interrogate each of the hearing representatives and then compile the information, and then answer the question on information and belief? What if the hearing representatives decline to furnish the information to whomever among the defendants requests it? Will one of the defendants be held in contempt then until the hearing representatives, and each of them, agree to furnish him information the disclosure of which he has no power to compel? We urge

these are valid objections to the questions set forth in interrogatory No. 2.

*Interrogatory No. 3:* The information requested in interrogatory No. 3 has no possible bearing whatsoever on this action. Only the second of the three parts of the question purports to relate in any way to California's correctional system. Part (c) requests matter written by any current Adult Authority member on any subject. There are current Adult Authority members who are not defendants in this action and who did not in any way participate in any of the designated proceedings which affected the named plaintiffs. Plaintiffs' demand for articles on any subject confesses irrelevance. Similarly, part (a) of the question is also without restriction as to topic or time.

We repeat, the subject matter of this action is whether the proceedings designated in interrogatory No. 41 and in the complaint which affected these seven named plaintiffs comported to applicable standards of due process. We are somewhat at a loss to understand plaintiffs' interest in any evaluations that these defendants (who lack expertise and who are "in fact extremely unsuited to their tasks") may have made of past or current Adult Authority procedures.

It would be burdensome for each of the members to file and furnish the information demanded in interrogatory No. 3. The motion to compel an answer to interrogatory No. 3 purports to now narrow the inquiry: "Certainly it cannot be denied that the Adult Authority members are quite knowledgeable about the procedures which they themselves have established



and purportedly follow, . . . " (plaintiffs' appendix, p. 7:30-32). The procedures established and followed by the Adult Authority have been asked for elsewhere in the discovery demands and provided by defendants. See answers to interrogatory No. 21. Defendants see almost no relationship between the text of interrogatory No. 3 as it reads in the interrogatories and plaintiffs' version of that interrogatory as paraphrased in their motion to compel (appendix, p. 7-8).

*Interrogatory No. 4:* Interrogatory No. 4 is vague in its reference to "any formal or informal meetings" and by use of the term "groups." This vagueness when combined with the sweeping scope of the interrogatory (it covers any "formal or informal meetings" with any of six classes of persons over a period of over three and one-half years without reference to the purpose of the meeting) renders the interrogatory oppressive both in terms of compilation of the data and in terms of its disclosure. The interrogatory is harassing in that its casts such burdens without consideration of the value the information may have to plaintiffs in this action. Of what value would such a list of meetings be to plaintiffs? Perhaps plaintiffs would intend to investigate each of the listed meetings to determine whether some remark was made by one of the members critical of the correctional proceedings. Even assuming such possibilities, we fail to see how such information would be of value to the plaintiffs or to the Court in determining whether the proceedings designated in the complaint which affected the named plaintiffs comported to applicable standards of due process.

Plaintiffs find fault with defendants' furnishing the information sought in interrogatory No. 5 while also objecting to interrogatory No. 4. The difference between the two interrogatories is obvious: No. 5 casts a very minimal burden in that it asks only for the most recent visit of each defendant to each of four types of places. The information sought is also arguably of more relevance than that sought in interrogatory No. 4 so that defendants felt that in the balance the information ought to be provided without the necessity of litigating the point.

*Interrogatories Nos. 7 through 40:* These interrogatories ask about seven proceedings at which the seven named plaintiffs were considered for parole. Each of the proceedings occurred well after the complaint was filed and they are neither challenged nor referred to in the complaint. These seven proceedings therefore are not part of the subject matter of the action.

All of the questions asked in interrogatories Nos. 7 through 40 were, and are, objectionable on several grounds principal among which are irrelevance and mootness. The information sought is irrelevant because it relates to proceedings which occurred after the complaint was filed. There is no present basis in this action for challenging or reviewing the validity of these particular proceedings. What occurred during these proceedings could not assist either counsel or the Court in determining whether the proceedings designated in the complaint as affecting the seven named plaintiffs comported to the applicable require-



ments of due process. That question must be determined on what occurred at those earlier proceedings and not on the basis of what occurred at some subsequent proceeding.

Nor would this information furnish the Court a proper basis for determining what procedures ought to be provided in future parole granting hearings. This is so because the proceedings used by the Adult Authority have changed since the actions designated in our answer to interrogatory No. 6 were taken and further changes are presently in active litigation in the state courts.[10]

The information sought in interrogatories Nos. 7 through 40 therefore would furnish the Court a virtually irrelevant basis for any decision it may be inclined to reach.

Secondly, interrogatories Nos. 7 through 40 are objectionable on grounds of mootness. Four of the seven named plaintiffs have been released on parole. Van Geldern, Murrin, and Gardner were paroled in 1973 and Lewis was paroled in December 1972. Each of the actions designated in our answer to interrogatory No. 6, and the subject matter of interrogatories Nos. 7 through 40, related to hearings on consideration of whether to grant parole. Issues concerning the validity of such proceedings and of the procedures followed are rendered moot where the prisoner is granted parole. *United States Board of Parole v. Merhige, supra,*

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[10] *E.g., In re Strum,* Crim. No. 16799, Cal.Sup.Ct.; *Saunder v. California Adult Authority,* 1 Crim. No. 12704, Cal.Ct.App., 1st App. Dist., Div. I.

487 F.2d at 28. This objection covers in their entirety interrogatories Nos. 7 through 40 insofar as they are asked of the defendants Hoover, Lynum, and Lopez. This would also cover those interrogatories asked of the defendants Procunier and Spangler which refer to the proceedings taken with respect to the four inmates who were paroled.

We wish to point out that despite the availability of valid objections defendants nevertheless undertook to furnish the information sought in interrogatories Nos. 7 through 40.

For the above reasons and for the reasons stated in the body of defendants' answers to interrogatories Nos. 7 through 40, defendants submit that their objections are well taken and that plaintiffs' motion to compel further answers to the interrogatories is not well taken.

GORDON—*Interrogatory No. 41(b):* The defendant Gordon submits that the statement of his objection to this interrogatory as it appears in his answers to the interrogatories is clear, unequivocal, and well taken. The interrogatory asks about Mr. Chatfield's parole revocation proceeding in January 1972. Defendant Chatfield's version of what occurred at those proceedings is set forth in the complaint and on the basis of these allegations the complaint seeks for Mr. Chatfield a new revocation hearing at which additional due process rights would be provided.

The precise same hearing was the subject matter of a habeas corpus action brought by Mr. Chatfield. Not only has Mr. Chatfield had his day in court with



respect to a challenge of the validity of this proceeding, his day was in this Court, it involved the very same proceeding, and Mr. Chatfield's challenge was successful. Judge Schnacke ordered that a new hearing be granted and that the procedures followed at the new revocation hearing conform to the requirements of *Morrissey v. Brewer, supra,* and *Gagnon v. Scarpelli, supra.* A copy of Judge Schnacke's order was attached to defendant Gordon's answer. Since a subsequent granting of parole moots issues sought to be litigated with respect to an earlier parole granting hearing, *United States Board of Parole v. Merhige, supra, a fortiori,* the granting of a new parole revocation hearing under new and expanded due process rights as enunciated by the United States Supreme Court should also moot issues sought to be litigated with respect to an earlier parole revocation hearing.

Indeed, by virtue of Judge Schnacke's ruling, the plaintiff Chatfield is no longer a proper party in this action since there is nothing relating to him in the complaint which remains justitiable. Plaintiffs' persistent demands for this information are groundless and express counsel's interest in putting defendants to wasteful efforts.

LYNUM—*Interrogatory No. 41(b) 39:* Pursuant to plaintiffs' demand for documents, demand No. 1, Mr. Van Geldern's file is being provided for counsel's examination. This file, as well as the files of the other named plaintiffs, will be at the Adult Authority office at the Ferry Building in San Franciscso for this purpose. Mr. Burgeson, counsel for plaintiffs, has made an appointment to examine these files at 9:00

a.m., on March 29, 1974, at the above location. The answer to interrogatory No. 41(b) 39 may be ascertained from Mr. Van Geldern's file, the burden of ascertaining the information is substantially the same for counsel for plaintiffs as for the defendant Lynum, and counsel is afforded a reasonable opportunity to examine the files. This is a sufficient answer to interrogatory No. 41(b) 39. Rule 33(c), Fed. R. Civ. Proc.

LOPEZ—*Interrogatory No. 41(a) 39:* See the response set forth above to Lynum—Interrogatory No. 41(b) 39.

EDMAN—*Interrogatory No. 41(a) 39:* Defendants move to compel a further answer to this question on the following grounds: "The response does not fully answer the question, which asks what role the reports in question played in the decision reached by the Adult Authority" (plaintiffs' appendix, p. 12:12-14). Interrogatory No. 39 [41(a)] does not ask this question. As to the question actually asked, see the response set forth in Lynum Interrogatory No. 41(b) 39, *supra.* The file of Mr. Lewis will be made available along with the other of plaintiffs' files.

We also note that insofar as interrogatory No. 41 refers to Billy Ray Lewis' parole consideration hearing in April 1972, the issues raised with respect to that proceeding are now moot in view of the circumstance that Mr. Lewis was granted parole in December 1972. *United States Board of Parole v. Merhige, supra,* 487 F.2d at 28.

Insofar as plaintiffs' motion to compel a further answer by the defendant Edman to interrogatory No.



41(a) 39 is a typeographical error and intends to refer to No. 41(a) 38, the defendant submits that the answer set forth is in fact full and complete.

EDMAN—*Interrogatory No. 41(c) 9:* As is stated in the defendant Edman's response to this interrogatory, the only decision made with respect to Mr. Van Geldern in February 1972 was, in effect, to not decide and to submit the matter at a later time for consideration by the Adult Authority sitting *en banc.* Accordingly we respectfully disagree with counsel's assertion that "since Mr. Van Geldern did not appear at the *en banc* hearing in May 1972, the balance of the questions through question 40 are not inapplicable [to the proceeding in February 1972]" (plaintiffs' appendix, p. 12:16-18).

Secondly, in view of the circumstance that Mr. Van Geldern was granted parole in 1973, the issues sought to be explored by interrogatories Nos. 41(c) 9 through 41(c) 40 are rendered moot. *United States Board of Parole v. Merhige, supra,* 487 F.2d at 28.

EDMAN—*Interrogatory No. 41(d) 39:* See response to Lopez—Interrogatory No. 41(a) 39, *supra,* and Lynum—Interrogatory No. 41(b) 39, *supra.* Mr. Van Geldern's file will be made available to counsel along with files of the other named plaintiffs.

BROWN—*Interrogatory No. 41(d):* See response set forth in Gordon—Interrogatory No. 41(b), *supra.*

PROCUNIER—*Interrogatories Nos. 10, 11, 12, 14, 39:* See response under interrogatories Nos. 7-40, *supra.*

SPANGLER—*Interrogatories Nos. 10 through 39:* See response to interrogatories Nos. 7-40, *supra.*

SPANGLER—*Interrogatory No. 41:* Mr. Spangler has answered or properly objected to these questions. In answering, Mr. Spangler makes frequent reference to answers given by other defendants who actually participated in the proceedings to which the questions are directed.

We do not understand how this approach impairs counsel's search for the information, or for the truth. The information has been provided by the participating members (or properly objected to by them), or by providing counsel access to plaintiffs' files.

Plaintiffs' persistence in demanding that Mr. Spangler provide further answers to interrogatory No. 41 must be similar to the demand respecting interrogatory No. 13. There the participating members answered the questions and plaintiffs have found no problem with the answers given and have made no reference to them in their motion to compel. Yet plaintiffs insist that Mr. Spangler nevertheless must give his second-hand answers to these questions.

These demands are not well taken, and seek only to impose on defendants the greatest burden possible under plaintiffs' construction of the discovery rules.



## Defendants' Response To Plaintiffs' Motion To Compel Production Of Documents.

### I

Plaintiffs were informed that those portions of their files which the Department of Corrections had waived their privilege against disclosing will be made available for inspection in San Francisco. In addition, they have been further advised that since the filing of their objections in this case the Department of Corrections has adopted a broader policy of waiver. Hence, all portions of plaintiffs' files, except those which would endanger institutional or staff security, pose a danger to the safety of another person or significantly impair the rehabilitation or adjustment of plaintiffs if communicated to them, will be made available.

Contrary to plaintiffs' allegations in the instant motion there is ample authority to support defendants' assertion of a valid state interest in keeping those portions of the files referred to in the preceding paragraph confidential. The state's interest are many but three come immediately to mind: (1) the protection of individuals, including informants inside and outside of prison and insuring institutional security. *See Morrissey v. Brewer,* 408 U.S. 471, 487 (1972); *McCray v. State of Illinois,* 386 U.S. 300, 308-309 (1967); *In re Prewitt,* 8 Cal.3d 470, 475-476, 105 Cal. Rptr. 318, 322-323 (1972); *In re Harrell,* 2 Cal.3d 675, 691, 87 Cal.Rptr. 504, 514 (1970), *cert. denied,* 401 U.S. 914; (2) Encouraging candor and complete disclosure of information concerning inmates from

both public officials and private citizens, *see* Calif. Evid. Code § 1040; *Chronicle Publishing Co. v. Superior Court,* 54 Cal.2d 548, 568-570, 7 Cal.Rptr. 109, 121-122 (1960); (3) The requirements of certain statutes providing for the confidentiality of statements and recommendations submitted by the judge, district attorney, and sheriff [California Penal Code sections 3046, 1203.01], or in response to notices given under California Penal Code sections 3022 and 3042, and a limitation respecting the inspection of certain criminal records [Penal Code sections 11105(b), 11120, 11122-11125].

The defendants, in their initial response to plaintiffs' request for production of their inmate files asserted a claim of privilege under California Penal Code section 2081.5 as implemented through California Evidence Code section 1040(b)(1). Without citation of authority plaintiffs in their current motion state that California Penal Code section 2081.5 does not create an absolute privilege against the disclosure of these documents. California Penal Code section 2081.5 provides in pertinent part that:

> "The Director of Corrections shall keep complete case records of all prisoners under custody of the Department, which records shall be made available to the Adult Authority and the Board of Trustees of the California Institution for Women at such times and in such form as each board may prescribe.
>
> "Case records shall include all information received by the Director of Corrections from the courts, probation officers, sheriffs, police departments, district attorneys, State Department of Justice, Federal Bureau of Investigations, and other interested agencies and persons. Case records shall also include a record of diagnostic findings, considerations, actions and dispositions with respect to classifications, treatment, employment, training, and discipline as related to the institutional correctional program followed for each prisoner.
>
> * * *"



As noted in defendants' brief points and authorities in support of their objection to production, California courts have held that access to these files is limited to those persons enumerated in Penal Code section 2081.5. *See Yarish v. Nelson,* 27 Cal.App.3d 893, 901-902, 104 Cal.Rptr. 205, 211-212 (1972); *cf. In re Harrell,* 2 Cal.3d 675, 691, 87 Cal.Rptr. 504, 514 (1970); *Alanis v. Superior Court,* 1 Cal.3d 784, 787, 83 Cal. Rptr. 355, 357 (1970).

Generally plaintiffs have argued that this proscription against disclosure does not apply to litigants. Unlike the Federal Rules of Criminal Procedure, California has long recognized the criminal defendant's right to broad pre-trial discovery.

> "Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly

> impeached as the evidence permit. To deny flatly any right of production on the ground that an imbalance would be created between the advantages of prosecution and defense would be to lose sight of the true purpose of the criminal trial, the ascertainment of the facts." *People v. Riser,* 47 Cal.2d 566, 586, 305 P.2d 1, 13 (1956). *Compare,* Fed. Rules of Crim.Proc., Rules 16 § 17(c), Criminal Discovery, 19 Hastings L.Jour. 865, 869.

Yet, the California courts have recently held that litigants, two prisoners being prosecuted for murder, are not entitled to discovery of the entire contents of their prison files maintained by the California Department of Corrections. The court found that the files are subject to the absolute privilege against their disclosure set forth in California Evidence Code section 1040(b)(1) implementing Penal Code section 2081.5. *Procunier v. Superior Court* (*Lasoya*), 35 Cal.App.3d 207, 209, 110 Cal.Rptr. 529, 530 (1973), hearing denied, January 23, 1974.

At the informal conference between counsel held on February 5, 1974, it was suggested to plaintiffs that they at least inspect the material defendants agreed to make available on November 30, 1973, before seeking a motion to compel further production. Rather than pursue this suggestion a notice of motion to compel dated February 28, with Points and Authorities dated March 6, were served on March 8. Defendants respectfully submit that such conduct does not evidence a "good faith attempt to resolve differences insofar as possible without court intervention." *See* Local Rule 116. If upon completion of the inspection



of those parts of the files defendants have already agreed to make available, plaintiffs are unsatisfy defendants will produce in this Court all items withheld for reasons of institutional and staff security, safety of other persons or to insure against impairment of the rehabilitated process for in-camera inspection.

## II

Defendants agreed to make available, and have indeed made available, to plaintiffs the substantive standards or criteria used by them during the last five years in making their decisions with respect to parole granting, term fixing, parole recession and parole revocation which are still in their possession. Plaintiffs now seek to enforce their demand for "all documents" setting forth such substantive standards. Defendants have refused to make available to plaintiffs only "preliminary drafts, notes, or inter-agency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business" (California Government Code section 6254) which may set forth and discuss these substantive standards or criteria. However, the substantive standards or criteria are contained in the Regulations, Resolutions, and Policy Statements of the Adult Authority heretofore made available to plaintiffs.

Plaintiffs' request for all documents relating to the substantive standards or criteria which have been made available to them is, we submit, similar to the demands of the defendants in *Shelley v. The Maccabees,* 27 F.R.D. 415, 416-417 (E.D. N.Y. 1961). Wherein

after having been provided with a copy of the final report of the New York State Insurance Department they sought discovery of that agency's "worksheets, schedules, memoranda, original and copies of any records, papers, or documents and original and copies of all correspondence and communications between the parties made prior to the preparation of the final report." The district court refused to order discovery of any material of other than the final report on the grounds that the preliminary memoranda and reports are strictly limited to the use and convenience of the state agency and they are not of a public nature. The Federal Freedom of Information Act recognizes a similar exemption against the disclosure of inter-agency or intra-agency memoranda or letters. 5 U.S.C. § 552(b)(5). The purpose for these exemptions is, of course, to encourage the free exchange of ideas during the process of deliberation and policy making. *Soucie v. David,* 448 F.2d 1067, 1077-1078 (D.C. Cir. 1971). The disclosure of such memoranda have been recognized as having a detrimental affect on a governmental agency's decision making process.

> "[A] full and frank exchange of opinion would be impossible if all internal communications were made public. [Agency witnesses] intended, and with merit, that advice from staff assistants in the exchange of ideas among agency personnel would not be completely frank if they were forced 'to operate in [a] fish bowel.'" *Sterling Drug Inc. v. S.T.C.,* 450 F.2d 698, 706-707 (D.C. Cir. 1971), (quoting from 10 (1966) U.S. Congressional and Administrative News, p. 2427).



Recognizing the government's interest in avoiding disclosure of documents which reflect intraagency advisory opinions and recommendations whose confidentiality contributes substantially to the effectiveness of government decision making processes, the procedure for "in-camera" inspection of documents for which this privilege is claimed has been recognized. *See Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792 (D.C. Cir. 1971). However, the parties seeking discovery must make a preliminary showing of necessity to warrant even the "in-camera" disclosure. *See Committee v. Seaborg, supra.*

Defendants respectfully submit that having made available the substantive standards or criteria used by the Adult Authority they may properly claim protection for any "preliminary drafts, notes, or inter-agency or intraagency memoranda" used in preparation and modification of those standards.

## III

Plaintiffs made two requests; one for "substantive standards or criteria", another for "procedures to be followed" in the Adult Authority proceedings. So far as defendants can determine the procedures sought are contained in the Regulations, Resolutions, and Policy Statements made available to plaintiffs in response to their Request No. 2.

Plaintiffs' motion is an example of how their failure to inspect the records defendants agreed to produce evidences a lack of any good faith attempt to resolve these differences insofar as possible without court intervention.

Plaintiffs claim that they received a response from our office to an "almost identical request" in *Taylor v. Breed,* No. C-70 1522OJC (ND Cal.). Defendants' counsel has discussed that matter with the Deputy Attorney General representing the defendants in that case and has determined that that response was "almost identical" to the response in the instant case. That is to say, the Regulations, Resolutions, and Policy Statements contain both the substantive standards and criteria as well as the procedures to be followed.

IV

Defendants submit plaintiffs' failure to describe these items or category of items with "reasonable particularity" so that they can be identified by the defendants is conceded in their motion to compel. Moreover, this is another example of a difference which Local Rule 116 requires there be a good faith attempt to resolve prior to seeking court intervention. The "apparent misunderstanding" to which plaintiffs refer was not raised by counsel at the informal hearing held on February 5, 1974. Defendants believe that their interpretation of plaintiffs' original request was a fair one. Had plaintiffs sought only the agendas, minutes and summaries of Adult Authority's meetings concerned with matters of policy they should have clearly stated. Upon receipt of a proper request defendants will review the material sought to determine if the privileged material referred to in our previous opposition may be excised from the unprivileged material. If this can be done without undue hardship the material will be made available.



V

Apparently by this request plaintiffs hope to obtain a listing of every document in every file maintained by the Adult Authority so they can request its production in subsequent motions. If plaintiffs would draft their requests will an eye toward establishing relevancy defendants submit there would be no need for these indexes, guides, table of contents or similar documents. Moreover, it would impair the confidentiality of the files and documents themselves to compel disclosure of portions of them in this manner.

VI

Plaintiffs claim this memorandum is relevant as impeachment of Mr. Kerr. While its author Mr. R. E. Doran may be such a witness, defendants are unaware of any rule of evidence by which his memoranda may be so used. Since plaintiffs have shown that the memoranda may lead to admissible evidence defendants will, if a copy is still in their custody or control, make it available to them.

VII

Rule 26(b)(1) of the Federal Rules of Civil Procedure limits discovery to nonprivileged material which is relevant to the subject matter of the pending litigation. Thus, while we contend that the matters sought in this request are privileged, even if they were not, they would still be outside the scope of discovery as irrelevant to the subject matter of the pending litigation. *See* general discussion of relevancy, *supra.*

California Government Code section 6254(c) provides in pertinent part that personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy, need not be disclosed. Thus, unlike California Government Code section 6254(a) or California Evidence Code section 1040(b)(2); section 6254(c) does not involve a balancing of the state's interest in withholding the records against a public interest in disclosure. All that need be shown is an unwarranted invasion of personal privacy.

In this request plaintiffs seek the same data from the Adult Authority they sought from the individual defendants in Interrogatories Nos. 1 and 2. *See* discussion in these two interrogatories, *supra*. In addition, the lack of relevance of these documents to the subject matter of the pending litigation (discussed *supra*) renders their disclosure an unwarranted invasion of privacy. Thus, the Adult Authority has demonstrated that the records sought are exempt under express provisions of the California Public Records Act (California Government Code section 6255) and their claim of privilege finds its application through California Evidence Code section 1040(b)(1). *See Procunier v. Superior Court,* 35 Cal.App.3d 207, 209, 110 Cal.Rptr. 529, 530 (1973).

### IX and X

Plaintiffs originally requested production of "copies of all *testimony*" (emphasis added), but their motion to compel refers to "speeches and statements." These



were the subject of plaintiffs' Request No. 10. While defendants objected to the vagueness of the wording of plaintiffs' Request No. 10 they nevertheless agreed to make available to plaintiffs all speeches, copies of whose texts or summaries are still within their custody and control. This includes speeches before any executive, judicial, or legislative bodies.

By addressing separate requests, plaintiffs clearly recognized the distinction between testimony given before any executive, judicial or legislative body and speeches or statements given to such groups. With specific reference to plaintiffs' Request No. 9 defendants understand testimony to be "the statements or declarations of a witness under oath or affirmation, usually in court." Random House Dictionary of the English Language, copyright 1966. Webster's New International Dictionary, 2nd Edition, states: "Testimony is a species of evidence." As evidence it would have been given to, recorded and retained by the executive, judicial or legislative body before whom a member, hearing representative, or executive officer of the California Adult Authority appeared. Since such evidence is no longer in defendants' custody they suggested plaintiffs seek this material from the bodies before whom it was taken pursuant to the procedure outlined in Rule 34(c) of the Federal Rules of Civil Procedure In order to facilitate their search defendants agreed to make available lists showing the appearance of every member, hearing representative, or the executive officer of the California Adult Authority may have made before any executive, judicial or legis-

lative body. *See* Defendants' Response to Plaintiffs' Request Nos. 8 and 11 to which no objections have been filed. Any claim of privilege concerning the disclosure of such testimony would rest with the executive, judicial or legislative body who took the testimony. *Compare,* Calif. Evid. Code § 1040. Hence, the assertion of that privilege, if any, can only be made by representatives of those entities. *See* Calif. Evid. Code § 1040(a). For these reasons defendants suggested the procedures of Rule 34(c).

## XII

Plaintiffs complain that defendants could easily meet their request for "all statistics whatsoever" if they were acting in good faith. Defendants point out that with respect to most if not all of the statistics referred to by way of example by plaintiffs in their request we have made them available. In addition defendants have agreed to make available to plaintiffs all statistics they feel relevant to the subject matter of this action. However, they object strongly to a request using such language as "all statistics whatsoever." Since Federal Rule 26(b)(1) limits discovery to nonprivilege items relevant to the subject matter of the pending action a demand such as that tendered by plaintiffs does not comport with the requirements of the Federal Rules. While such a request does describe a "category with reasonable particularity" plaintiffs must assume the burden of limiting these general requests by reference to the subject matter of the material sought so that the defendants can determine whether it is privileged or can be produced. It



is unconscionable, defendants submit, to make such a general demand without any specification as to relevancy and then seek a motion to compel when the defendants have determined, without guidance by plaintiffs' request, that the material sought is irrelevant. This is the defect of Plaintiffs' Request Nos. 10, 12, 14, 17, 18, and 20.

Plaintiffs made one visit to the Adult Authority to inspect all of these documents on March 5, 1974. The following day they signed the Points and Authorities in support of their motion to compel production. Defendants respectfully submit that plaintiffs' preparation of the notice of motion and points and authorities in support thereof prior to inspecting any of the records defendants agreed to make available and, their failure to request an informal conference pursuant to Rule 116 following their inspection of those documents and prior to filing the motion is inconsistent with "a good faith attempt to resolve differences insofar as possible without court intervention." Local Rule 116.

## XIII

Voting records are kept in the individual inmates' central prison files. This request would require the defendants to inspect the file of every adult male prisoner who was encarcerated during the last five years. As noted in our Response No. 1, *supra,* these voting records will be provided as to the named plaintiffs. To provide every such document would impose an intolerable burden on the defendants far outweighing any benefit to plaintiffs in view of the questionable

relevancy of this information. Moreover, absent a court determination that this matter may properly proceed as a class action defendants cannot give open access to the files of other inmates. *See* Calif. Pen. Code § 2081.5 as discussed, *supra,* No. 1.

XIV

As noted in our response to No. 12, *supra,* this is again too general a demand. It seeks every report prepared by any member, hearing representative, executive officer, or any other employee or official of the Adult Authority without respect to the subject matter of the report or even the date of its preparation. Where plaintiffs state a specific report a detailed response is possible. As an example, plaintiffs in their request referred to the reports mentioned in defendant Kerr's deposition. These were reports submitted "after study of a particular problem" and as such are reports of investigations conducted by a state agency for correctional purposes. They are privileged under the provision of the California Government Code section 6254(f) and California Evidence Code section 1040(b)(1) which prohibits their disclosure. *See Procunier v. Superior Court,* 35 Cal.App.3d 207, 209, 110 Cal.Rptr. 529, 530 (1973). *See also,* the discussion, *supra,* No. 2 concerning intraagency memoranda.

XV

Beyond the materials made available to plaintiffs in our response to their Request No. 10, this request seeks intragency and interagency memoranda to which defendants have asserted the privilege of California Government Code section 6254(a). See our discussion of this and its federal counterpart in our Response No. 2, *supra.*



XVI

Plaintiffs state that the most detailed breakdown of the Adult Authority budget for each of the past five years is relevant if they can show that the "present system" utilized by the Adult Authority is unconstitutional on due process grounds. However, the "present system" is not at issue here. See fn. 5, *supra.* Should plaintiffs establish that the system in use prior to *Morrissey v. Brewer,* 408 U.S. 471 (1973), was constitutionally defective on due process grounds, the effect would be to require new hearings in conformity with proper standards. Budgetary considerations seldom enter into the balance when courts promulgate due process safeguards. Compare *Morrissey v. Brewer, supra; Clutchette v. Procunier,* 328 F.Supp. 767 (N.D. Cal. 1971). To the extent that court's consider budgetary considerations at all they are afforded little weight and defendants respectfully submit that further breakdown of the budget of the Adult Authority already available to plaintiff is irrelevant to this action.

However, defendants have agreed to provide plaintiffs on request with additional breakdown of any item listed in the published budget. All defendants request is a brief statement by plaintiffs showing the relevancy of the additional breakdown to the subject matter of the pending litigation.

## XVII

Plaintiffs did state to defendants' counsel at the informal hearing that it was not their intention to request documents not in the defendants' custody or under their control. However, plaintiffs again have made no attempt to delineate the studies sought in this request by reference to the subject matter thereof. Absent such additional specification, this is a general demand similar to that opposed in objection No. 12 above.

Defendants have however agreed to make available to plaintiffs any studies in their possession prepared by anyone other than a member or employee of the Adult Authority since these have "previously been published." With respect to those studies not published, defendants urge that these are records of investigations conducted by a state agency for correctional purposes and they assert the privilege of the disclosure of these studies conferred by California Government Code section 6254(f) and California Evidence Code section 1040(b)(1).

## XVIII

Defendants cannot perceive how the material sought in this request differs from the materials sought by plaintiffs in their Request No. 17 to which defendants have agreed to make all previously published material available. However, if plaintiffs seek intragency proposals defendants object for the reasons discussed in our Response No. 2, *supra.*



## IXX

Defendants refer to their general discussion of relevancy, *supra,* and the specific discussion on inter-agency memoranda in Response No. 2, *supra.* The request does not limit itself to articles discussing the function and workings of the Adult Authority in the parole process, to current employees or to any particular span of time.

## XX

The overbreadth of this request is flagrant. Again, plaintiffs refuse to describe the material sought other than as "all memoranda." No attempt is made to set forth subject matter of the items sought or other indicia of relevancy. Defendants restate their objection as set forth in more detail in their No. 12 above as well as their general argument concerning relevancy. In order to stimulate the free exchange of ideas within the department so that change may be forthcoming where needed, the department has an interest in maintaining the confidentiality of preliminary drafts, notes, or inter-agency and intra-agency memoranda not normally retained by them in the ordinary course of business. See Calif. Govt. Code § 6254(a). See discussion on intra-agency memoranda, Response No. 2 *supra.* It is further conceivable that many of these memoranda sought under this request undoubtedly contain reports of complaints to or investigations conducted by the agency for correctional purposes. Thus they are afforded protection without a balancing of interest test. See Calif. Govt. Code

§ 6254(f). Since they may also contain official information acquired in confidence by a public employee in the course of his duties they are absolutely privileged under California Evidence Code section 1040 (b)(1).

XXI

The complaint in the instant case was filed on November 15, 1972. By this request the plaintiffs seek all documents in effect on that date pertaining to the Adult Authority's policies and resolutions. In addition they seek all such documents executed or issued subsequent to the filing of the complaint. Requests Nos. 2 and 3 ask for all documents used by the Adult Authority setting forth procedures as well as substantive standards and criteria to be used in rendering parole granting, term fixing, parole rescission, and parole revocation decisions. Except for preliminary drafts, notes, or interagency and intragency memoranda not normally retained by the Adult Authority in the ordinary course of its business, these documents have been provided. To the extent plaintiffs are unsatisfied and seek these additional matters as well as any matters coming within the definition of California Government Code section 6254(f), records of complaints or investigations conducted by the Adult Authority for correctional purposes, defendants refuse. See discussion re intragency memoranda, *supra* No. 2. Defendants submit there is little if any public interest in the disclosure of these documents although they concede plaintiffs have exhibited considerable private interest in their disclosure.



Defendants submit that they have adequately responded to this request by making available the material in response to Request No. 2.

XXII

In addition to the opposition stated in Item XXI above, defendants respectfully submit the material requested is irrelevant in that it seeks documents issued during the past calendar year. For the reasons expressed in our general discussion of relevancy such documents are irrelevant to the issues presented in the instant litigation.

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Some of the claims of privilege advanced by defendants are absolute claims. These we submit must be recognized by this Court or they would be rendered completely meaningless.

> "If this Court were to accept petitioner's contention that this privilege should be approached in an *ad hoc* manner, being dissolved when necessity for the privileged information is shown, and no specific reasons for the upholding of the privilege advanced, then the underlying reasons for the existence of the privilege would be thwarted just as fully as if it did not exist." *Koth v. Perini,* 283 F.Supp. 1 (N.D. Ohio 1968).

Other claims of privilege involve a weighing of interests which only this Court can undertake. We urge this Court however, to consider the relevancy of the material sought to the issues presented by this action as the most important factor in this equation.

BECAUSE PLAINTIFFS' MOTION TO COMPEL IS NOT SUBSTATIALLY JUSTIFIED, PLAINTIFFS OR THEIR ATTORNEYS ADVISING THE MOTION, SHOULD BE ORDERED TO PAY REASONABLE EXPENSES INCURRED IN OPPOSING THE MOTION.

Plaintiffs' motion to compel is not substantially justified. Plaintiffs' discovery requests are replete with demands for information to which they are not entitled or which they have already been provided.

Interrogatories Nos. 1, 2, 3, and 4 demand information which is irrelevant to the subject matter of the action, or which need not be provided because its value in the action is far outweighed by the burden of producing it. *See, Bergen Rambler, Inc. v. American Motors Sales Corp.*, 30 F.R.D. 334 (D.N.J. 1962).

Interrogatories Nos. 7 through 40 demand information which is not relevant to the subject matter of the action. *See Bergen Rambler, Inc. v. American Motors Sales Corp., supra.*

Especially vexacious are plaintiffs' demands that the defendant Spangler give second-hand information which has already been provided first hand by the other defendants. Similarly, plaintiffs' inquiries into Chatfield's past parole revocation must be considered vexacious because that proceeding was fully explored in another federal proceeding which resulted in a judgment favorable to Chatfield and which granted the relief demanded in this action.

Plaintiffs persist in demanding that everything, literally *everything,* they ask for must be provided under penalty of court intervention and imposition



of costs. This is so despite intervening circumstances which moot the subject matter of the action insofar as five of the seven named plaintiffs are concerned: Van Geldern, Murrin, Lewis, Gordiner, and Chatfield having been provided.

Plaintiffs' motion to compel appears to have been drafted before counsel had even examined much of what defendants provided. The motion is dated February 25, 1974; the other papers are dated March 8, 1974. Counsel's visit to the Adult Authority in Sacramento to examine documents was on March 5, 1974. Counsel will examine plaintiffs' prison files on March 29, 1974.

Plaintiffs falsely charge defendants with delaying the orderly progress of this litigation. It has been counsel for plaintiffs who have caused delay: the first interrogatories and demand for documents were not served until over seven months after the action commenced! Defendants answered them in 4½ months. Now, plaintiffs' first motion to compel is made over three months later. Our response to the motion is here presented within 14 days after we received it. Despite the language of Rule 23(c)(1), in the 16 months since the complaint was filed, plaintiffs' counsel have made no attempt to move the court under Rule 23 to determine whether this action may be maintained as a class action. Yet plaintiffs have persisted with discovery as if this were a class action.

Counsel's only justification for the long delay in serving the interrogatories and demand for documents was that they were waiting for an end of defendants' preliminary attempts to dismiss the action. Such a

delay, and counsel's excuse for it, of course are contrary to the spirit and intendment of the rules. Rules 33 and 34 permit service of discovery demands without leave of court.

No excuse is advanced by counsel as to why it took from November 1973 to March 1974 to file their motion to compel. No reason is advanced as to why counsel took until February 1974 to convene a conference under Local Rule 116, nor is any excuse offered for not filing the motion to compel until a month after that conference.

Insofar as advancing plaintiffs' action is concerned, in the 16 months since the complaint was filed counsel for plaintiffs (there are five attorneys whose names appear on the pleadings as counsel of record) have taken one deposition; served one set of interrogatories, the text of which is nine pages in length; served one set of Rule 34 demands, the text of which is five pages in length; and have filed two motions to compel discovery. It is ludicrous for plaintiffs to charge that defendants have delayed the progress of this action.

We also wish to emphasize that counsel persist in employing the most cumbersome possible procedures to vindicate the interests of the named plaintiffs. A striking example of what counsel *could* be doing for their clients is presented by Mr. Chatfield's habeas proceedings which litigated to a successful conclusion the same interests of Mr. Chatfield sought to be litigated in this action, but which counsel have not yet advanced beyond preliminary discovery stages. Van Geldern presents another example: while counsel were clumsily trying to litigate the validity of his 1972 de-



nials of parole, Mr. Van Geldern has been paroled. Similarly, Gordiner have been paroled and are presumably doing well, while counsel's attempts to challenge prior proceedings affecting them have wallowed in the cumbersome process invoked bby this action.

One wonders whether Mr. Van Geldern really wants to leave parole in Hawaii to return to San Quentin for the purpose of having a new hearing on whether he should be paroled. One wonders whether counsel are seeking to protect the interests of plaintiffs or whether they are only enforcing their own personal dislike of the Adult Authority and the California Department of Corrections.

Counsel assert that in most cases discovery is had without the necessity of court intervention. This may be true, but Rules 26-37 are among the most heavily annotated of all the rules.

Counsel accuse defendants of not cooperating. But experience teaches, and the text and demands of the motion to compel conferring that what counsel means by "cooperate" is for defendants to immediately give literally everything demanded.

Defendants *have* cooperated, and have volunteered a great deal of information requested by plaintiffs, even though valid objections could be raised. Defendants have not objected to everything objectionable. Counsel's non-negotiable demands describe *their* lack of cooperation, not ours:

> "Experience has established that counsel who draft interrogatories do so in the broadest possible form and that not infrequently they are satisfied with answers which respond in a much

more narrow fashion." *Apco Oil Corp. v. Certified Transportation, Inc.*, 46 F.R.D. 428, 431 (1969).

For all of the above reasons, plaintiffs' motion to compel is without substantial justification, and they, or their counsel, should be ordered to pay reasonable attorney's fees attributable to opposing the motion.

60 hours attorney's time was spent in preparing our opposition. Expenses for attorneys in the Attorney General's office including all overhead, are $23 per hour. Accordingly we request that plaintiffs or their counsel be assessed $1380 pursuant to Rule 37 (a)(4), Federal Rules of Civil Procedure, the entire amount to be paid if plaintiffs' motion is denied, or a proportionate amount to be paid if the motion is granted in part and denied in part.

Dated: March 25, 1975.

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023357

[Statements of Service Omitted in Printing]



In the United State District Court
for the Northern District of California

[Filed April 1, 1974]

[Caption Omitted in Printing]

PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

*Introduction*

In this reply memorandum, plaintiffs will discuss three principle issues which, in their opinion, at once explain and invalidate most of defendants' opposition to the instant motion to compel discovery. Then, in a separate Appendix hereto plaintiffs will treat certain specific objections interposed by defendants to certain interrogatories and requests for production.

1. *The Nature and Scope of This Action*

Although defendants' opposition is replete with misstatements of this case and of plaintiffs' position, there is one distortion which is so central to the instant motion to compel discovery that it must be dealt with immediately. That distortion consists of defendants' curious insistance—stated and restated through their opposition—that this action

> "does not concern the parole *system* (emphasis in original), but concerns only the particular proceedings which are designated by the named plaintiffs and which affected them. The only con-

> cern is whether *these* plaintiffs were denied due process in *these* proceedings." Defendants' Opposition at 2 (emphasis supplied).

Variations on this theme continue unabated throughout, with defendants claiming that the case is limited to certain proceedings "conducted during the 18 months period from December, 1970, to June, 1972" (*id.* at 2); that the action "concerns only past correctional procedures and will furnish no informational basis for the court to mandate future correctional procedures" (*id.* at 5); that the action is limited "to pre-*Morrissey* conduct" (*ibid.*); and that the "subject matter of this action is whether the proceedings designated in Interrogatory No. 41 and in the complaint which affected these seven named plaintiffs comported to applicable standards of due process" (*id.* at 17). At yet another point in their memorandum defendants argue that

> "The action is presently limited to the ten proceedings designated in the complaint and in Interrogatory No. 41. What plaintiffs' envision as a sweeping attack on California's correctional process is therefore nothing more than a joinder (see Rules 18 and 20, Federal Rules of Civil Procedure) of seven plaintiffs seeking review of ten particular correctional proceedings." *Id.* at 6.

By this bizarre attempt to limit the subject matter of this lawsuit to the individual entitlement of the seven named plaintiffs to some sort of relief, defendants have, quite simply, invented a new lawsuit. Although such a suit clearly is, in defendants' eyes, easier to defend, it suffers from the obvious and fatal defect



of bearing no resemblance whatever to the lawsuit which plaintiffs have in fact filed, or to the lawsuit in which Judge Weigel denied defendants' motion to dismiss.

In a similar vein, defendants continually imply that plaintiffs seek only "to impose newly developed procedures" on parole revocation hearings for the period from December 1970 to June 1972. *Id.* at 2. This statement, however, cannot withstand even one reading of the Complaint, which makes it clear that (1) the relief sought herein is more extensive than that granted by the United States Supreme Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). More importantly, defendants entirely ignore the fact that this lawsuit directly challenges the procedures surrounding the ongoing term-fixing, parole granting hearings which are at the very heart of this suit; which continue to be held annually with respect to almost every California prisoner; and which therefore are not limited to any previous period of time. Since both plaintiffs and defendants briefed this issue at the time defendants' motion to dismiss was heard and denied, it is curious indeed that defendants now conveniently ignore the fact that this most crucial of all Adult Authority hearings is totally unaffected by the holdings in the *Morrissey* and *Gagnon* cases.

Any common sense reading of the Complaint filed by plaintiffs herein—and, in particular, the injunctive relief which they have requested—makes it crystal clear that what this case is about is nothing more or

nothing less than plaintiffs' claim that the proceedings conducted by the California Adult Authority are unconstitutional on several different legal grounds. Thus at the very beginning of the Complaint there is a paragraph—which takes up about 5 pages—entitled "Nature of the Case" which makes it unmistakably clear to any man of ordinary intelligence that plaintiffs' central claim is that the hearing procedures employed by defendants are constitutionally infirm, and that as a result of this infirmity plaintiffs seek declaratory and injunctive relief to require that defendants henceforth adopt procedures which comport with certain minimal due process standards. See Complaint at 2-6. And, as may readily be seen from paragraphs 16 and 17 of the Complaint (at pages 26-31), plaintiffs' legal claims are predicated upon extensive and detailed factual allegations concerning, *inter alia,* (i) the identity and experience of the Adult Authority members, (ii) the material utilized by board members in arriving at their decisions, (iii) the grave inadequacies of the hearings and hearing procedures of the Adult Authority, and (iv) the failure of such procedures to accurately arrive at fair and impartial decisions.[1]

[1]Thus plaintiffs seek to obtain relief by establishing at trial a wide-ranging set of factual allegations which are spelled out in considerable detail in paragraph 16 of the Complaint. This crucial fact—which defendants seek to escape by ignoring the real nature and scope of the suit—entirely distinguishes this case from that of *United States Board of Parole v. Merhige,* 487 F.2d 25 (4th Cir. 1973), so heavily relied upon by defendants in their opposition. By contrast, the court in *Merhige* found that "the allegations of the complaint in intervention raises only questions of law, and we fail to see any necessity for extrinsic evidentiary development • • •." *Id.* at 28.



In addition, this action has been filed as a class action under Rule 23 Fed. R. Civ. P., and the relief sought is obviously the type of relief typically given thereunder to members of a class. Indeed, the extensive mandatory injunctive relief sought would make absolutely no sense if it were to be limited to the seven named plaintiffs herein. See, e.g., *Potts v. Flax,* 313 F.2d 284, 289 (5th Cir. 1963). Moreover, it is well settled that "[o]nce a suit is filed as a class action it should be assumed to be one, and treated as such, even prior to the actual formal determination that it is a class action. 3B Moore, *supra,* ¶23.50, p. 23-1103." *Torres v. New York Department of Labor,* 318 F. Supp. 1313, 1317 (S.D.N.Y. 1970). Accordingly, for purposes of discovery, the action should be treated as a class action unless and until a contrary ruling is issued by the Court.[2]

Finally, it is manifest that defendants and their counsel well understood, at the time they moved this Court for an order to dismiss the complaint, filed on December 23, 1972, the exact scope of this lawsuit. See defendants' memorandum of points and authorities in support of motions to dismiss or in the alternative

[2]Plaintiffs note in passing that the Attorney General, in many other prison cases, has not hesitated to move, on behalf of his clients, for an order by the court that the action not be maintained as a class action. See, e.g., *Charles v. Patterson,* No. C-71 1331 SAW (motion dated January 27, 1972); *Gonzalo v. Procunier,* No. C-73 1422 SAW (motion dated February 6, 1974). No such motion has been filed in this case, and Rule 23 itself merely provides that the court shall determine, by order, whether an action brought as a class action is to be so maintained; there is no suggestion that either the plaintiff or the defendant in such a case is obligated to file a motion on this issue.

for a protective order, dated December 22, 1972. Plaintiffs' subsequent memorandum of points and authorities in opposition to defendants' motion to dismiss also makes it quite clear that the entire thrust of the case has very little to do with whatever retrospective relief may be due to the named plaintiffs as individuals, but rather the prospective relief which would be appropriate if, as alleged, the present procedures followed by the California Adult Authority are in fact constitutionally infirm. Then, in defendants' reply memorandum, we find the following statement:

> "Defendants agree that such allegations as appear in the complaint in this case have not been made before, and certainly not in a pleading drafted and signed by counsel. If defendants' motion to dismiss is denied and this action is allowed to continue on the basis of the allegations in paragraph 16 of the complaint (Complaint pp. 26-29), we expect this Court to say so and we will also request this Court to make special findings with respect to the truth of each of these irresponsible allegations. We will also expect the Court to assess against plaintiffs defendants costs of disproving each allegation thus found untrue." *Id.* at 14.

With the case in this posture, this Court's denial of defendants' motion to dismiss, filed on March 8, 1973, is necessarily a binding determination that if plaintiffs can prove the facts which they allege in their complaint they are entitled to some relief.[3]

[3]In their opposition, defendants state that: "Plaintiffs assert that because Judge Weigel has denied defendants' motion to dismiss, he has also held that plaintiffs' allegations, if true, warrant *the relief demanded.*" Defendants Opposition at 4 (emphasis supplied). What plaintiffs in fact said was that: "In denying defendants' motion to dismiss, this Court has held that these allegations, if true, *entitled plaintiffs to relief.*" Plaintiffs' memorandum of points and authorities in support of plaintiffs' motion for an order compelling discovery pursuant to Rule 37 at 12 (emphasis supplied). This example, although relatively minor in nature, furnishes a good example of the type of misrepresentation which defendants have seen fit to use throughout their opposition.



Plaintiffs perceive no useful purpose in belaboring this point any further. Stated simply, the heart of this case is set forth with considerable specificity in paragraph 16 of plaintiffs' complaint. What plaintiffs must do is to prove, at trial, the truth of these allegations and, based upon such proof, their entitlement —as a matter of law—to a mandatory injunction which will require that the due process safeguards prayed for in the complaint be applied to the hearings conducted by defendant members of the California Adult Authority. Accordingly, all documents requested pursuant to Rule 34—and all interrogatories submitted pursuant to Rule 33—which would furnish *or lead to* evidence tending to prove the truth of the allegations contained in paragraph 16 are relevant within the meaning of Rule 26. Therefore when this case is viewed in the context of the complaint actually filed herein, rather than the curious suit invented by defendants in their opposition to discovery, it becomes clear why plaintiffs are entitled to the order sought by the instant motion to compel.

2. *The Question of Privilege*

The second basic defect in defendants' opposition is their wholly inadequate response to plaintiffs' argu-

ment concerning the question of privilege. In their memorandum (at pages 22-37), plaintiffs have shown that in Federal question cases, such as this one, state created privileges are not conclusive. Plaintiffs have also shown that, under California law, no statute or combination of statutes creates an absolute privilege to withhold the documents which are the subject of the instant motion to compel. Specifically, plaintiffs have demonstrated that Government Code Section 6254, which sets forth the exceptions to the California Public Information Act, does not—standing alone or in combination with Evidence Code Section 1040—create any such privilege.

Nevertheless, defendants make no effort whatsoever to refute plaintiffs' position with respect to the Federal question issue. And, so far as the Public Information Act argument is concerned, defendants place their entire reliance upon the case of *Procunier v. Superior Court,* 35 Cal.App.3d 207 (1st Dist. 1973). However, defendants have chosen to ignore the fact that the same court, in *Terzian v. Superior Court,* 10 Cal.App.3d 286, 294 (1st Dist. 1970), held that Government Code § 6254 does *not* establish an absolute privilege, since that section does "not impose an absolute prohibition on disclosure of the information in question." More importantly, defendants ignore yet another case, decided by the same court subsequent to the *Procunier* case, which also holds that there is no absolute privilege which shields such records from a litigant who seeks them through judicial discovery. See *Olson v. Pope,* No. 1 Crim. 11312, filed March 7, 1974, a copy of which is attached hereto. To the contrary, the court concluded that under *In re Prewitt,* 8 Cal.3d 470 (1972), such records are normally to be subject to discovery by a litigant, and "that the burden is on the Department to show that it is necessary to maintain the confidentiality of a document, rather than on an inmate to prove its relevancy and need in a habeas corpus proceeding." Slip Op. at 10. Since the *Olson* case (1) was decided subsequent to the date of *Procunier,* and (2) contains a well-considered, well-reasoned analysis of the issue of privilege, whereas *Procunier* contains the most cursory treatment of the matter, plaintiffs submit that this Court should follow *Olson* and *Terzian* in finding that California law affords no absolute privilege with respect to the documents involved in the instant motion to compel.



Therefore, whether the standard utilized in determining the question of privilege *vel non* is that set forth by federal or state law, the result is the same: a requirement that the Court balance the competing considerations involved. Yet on this point, as well, defendants have failed to meet their burden. Putting entirely to one side the fact that defendants have never filed a legally sufficient claim of governmental privilege,[4] defendants have still made no effort what-

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[4] "There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds,* 345 U.S. 1, 7-8 (1953). This requirement applies equally to claims of governmental privilege asserted by a state official. See *Carr v. Monroe Mfg. Co.,* 431 F.2d 384, 387 (5th Cir. 1970). In the case at bar, however, no such formal claim of privilege has been lodged. Instead, we have only a conclusory statement by the Attorney General that the documents involved are privileged. Moreover, such claims are often couched in the most equivocal language, such as the following: "Since they *may* also contain official information

soever to *show* that any given documents come within the statutory language of either Evidence Code 1040 or Government Code 6254. Instead, this Court is asked to give conclusive effect to the Attorney General's claim, even though the law is entirely to the contrary, as pointed out at pages 8-9 of plaintiffs' opening memorandum. Beyond that, defendants have not attempted any comparison of the state's interests in preserving the confidentiality of the documents (identified at pages 25-26 of defendants' opposition) with the need of plaintiffs to have access to all of the facts in this case. (Indeed, such an analysis would hardly be possible inasmuch as defendants have so grievously misconceived the nature and scope of the case.) Finally, defendants have made no effort to show that whatever genuine harm might inhere in the discovery sought by plaintiffs could not be cured by an appropriately drawn protective order.

In a similar case, where plaintiffs' Rule 34 request covered the entire spectrum of prison documents—including the *entire* central files of inmates other than the named plaintiffs—Judge Weigel ordered the discovery of all documents requested by plaintiffs. See *Charles v. Patterson,* C-71 1337 SAW order filed May 12, 1972). In doing so, the Court rejected the same claims of privilege here asserted by defendants. Attached hereto are copies of plaintiffs' Rule 34 request for production of documents and Judge Weigel's

acquired in confidence by a public employee in the course of his duties they *are* absolutely privileged under California Evidence Code Section 1040(b)(1)." Defendants' Opposition at 39 (emphasis supplied).



order of May 12, 1972. Plaintiffs submit that this ruling is squarely on point for purposes of the instant motion to compel, and should be followed in this case.

3. *Defendants' Opposition is not Substantially Justified*

The issue of awarding costs under Rule 37 may in large part be determined by this Court's decision on the merits of the instant motion, since the "burden of persuasion is now on the losing party to avoid assessment of expenses and fees rather than, as formally, on the winning party to obtain such an award." 8 Wright & Miller, *Federal Practice and Procedure* at 798. The test is not whether or not the losing party was acting in good faith in opposing or seeking to compel discovery (as the case may be), but rather whether the issues involved were those about which reasonable men could genuinely differ. *Id.* at 790. In plaintiffs' view, defendants' across-the-board opposition to *any* meaningful discovery in this case, as well as the specious grounds raised with respect to individual requests for production of documents or answers to interrogatories, renders an award of expenses against defendants not only appropriate but perhaps even essential if this case is to move along in an expeditious fashion.

For the most part, plaintiffs are content to rely upon the discussion of this issue which is found at pages 37-39 of their opening memorandum, which has not been adequately rebutted by defendants. However, plaintiffs would at this point respond briefly to the

following misleading statements contained in the defendants' opposition with respect to the question of delay:

A. Defendants make much of the fact that plaintiffs' initial interrogatories and demand for documents "were not served until over 7 months after the action commenced!" Defendant's Opposition at 42. However, it is the common practice of the Attorney General, in cases of this nature, to routinely move for a protective order which permits defendants not to respond to discovery until after a motion to dismiss has been decided. See, e.g., *Taylor v. Breed,* 58 F.R.D. 101 (N.D. Cal. 1973); *cf. Charles v. Patterson, supra* (motion dated January 27, 1972). Indeed, exactly such a motion was filed by defendants in this very case on December 23, 1972, on the ground that since the discovery in question "should not be deemed necessary to disposition of the motion to dismiss, it would be appropriate to avoid this substantial inconvenience pending disposition of the motion." Defendants' memorandum of points and authorities in support of motions to dismiss or in the alternative for a protective order at 8. When the Court denied defendants' motion to dismiss on March 8, 1973, they first filed a motion to amend the order of denial to permit an interlocutory appeal, which the Court denied on April 12, 1973. Defendants next filed, in the Ninth Circuit, a petition for writ of prohibition or mandate, seeking an order which would, in effect have required this Court to dismiss the case. When that petition was denied on May 10, 1973, defendants petitioned the same court



for a rehearing, which was denied on May 30, 1973. Thus it was not until the end of May, 1973, that defendants' preliminary efforts to terminate the case on the pleadings were finally laid to rest and plaintiffs were free to commence discovery without the likelihood that such efforts would be prohibited by a protective order. Thus it is somewhat hypocritical, at best, for defendants to now imply that had plaintiffs served their Rule 33 and 34 requests shortly after the filing of the complaint, they would have voluntarily cooperated.

B. Defendants state that they answered the first interrogatories and demand for documents in 4½ months. What defendants fail to mention is that they answered them only when this Court required them to do so by entering a strict order compelling discovery and awarding costs to plaintiffs, after finding that defendants' absolute refusal to answer or object was unjustified.

C. Defendants complain that the motion to compel was made over three months after defendants finally filed their voluminous objections. Although it may be that plaintiffs' attorneys could have filed their Rule 37 papers at an earlier date, it is certainly germaine to note that plaintiffs were required to exhaustively brief and document this issue because of defendants' almost total refusal to supply any of the documents requested, or even to acknowledge the actual scope and nature of the action itself.

D. Defendants occasionally insinuate that plaintiffs either did not inspect, or ought to have been sat-

isfied with, those few documents which defendants voluntarily made available, and which plaintiffs reviewed in Sacramento on March 5, 1974. See, e.g., Defendants' Opposition at 28, 34, 35. However, plaintiffs did in fact inspect every single document made available to them on March 5, 1974, except for some Adult Authority Resolutions and Policy Statements which, for the most part, are public documents, and in any event do not provide the type of information sought by the other requests. However, not only were the Adult Authority officials who produced the documents essentially unfamiliar with the nature of the Rule 34 request or the documents which were to be produced, the few documents that were produced contained very little information, and indeed the most pertinent statistics were produced only when plaintiffs' counsel insisted that they must exist, and that defendants must possess them. And, although defendants' employees promised to send photocopies (at plaintiffs' expense) to plaintiffs' counsel within two weeks, such copies have yet to be received. In short, plaintiffs' inspection of those documents voluntarily produced (1) took place prior to filing their motion to compel, (2) covered all documents produced, and (3) revealed that defendants are voluntarily producing virtually nothing which has any value for the purposes of this lawsuit.

E. The continuing use, by defendants' counsel, of nasty and accusatory remarks directed at plaintiffs' counsel, should not go entirely unnoticed. For example, in arguing that costs ought to be imposed against



plaintiffs or their counsel, defendants' attorney has seen fit to say:

> "One wonders whether counsel are seeking to protect the interests of plaintiffs or whether they are only enforcing their own personal dislike of the Adult Authority and the California Department of Corrections." Defendants' Opposition at 44."

Similar remarks, which have been gratuitously inserted by defendants' counsel throughout his memorandum, certainly appear unworthy of a member of the bar of this Court in conducting litigation of the utmost gravity.[5]

By way of summary, it is plaintiffs' position that defendants' opposition, although lengthy and spirited, simply will not withstand analysis. Specifically, that opposition rests upon (1) a completely falsified version of this lawsuit which bears no resemblance whatever to the suit itself, and which therefore invalidates a large part of defendants' objections to answering this discovery; (2) a wide-ranging claim of privilege which sweeps within its ambit virtually every document requested by plaintiffs, despite the fact that defendants do not attempt to refute plaintiffs' thorough showing that under both Federal and state law no absolute privilege exists; and (3) repeated insinu-

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[5]For example, defendants' counsel has stated that little or no guidance or restraint has been exercised by plaintiffs' counsel (Defendants' Opposition at 11, n. 8); stated further that a particular interrogatory is simply "a blatant attempt to harass Mr. Spangler and to needlessly burden defendants with redundant demands (*id.* at 14); and referred to plaintiffs' counsels' purported "interest in putting defendants to wasteful efforts" (*id.* at 22).

ations that plaintiffs and their counsel are acting in bad faith to harass and oppress a group of beleagered and long-suffering public servants. Once these three claims are rejected, however, there is little left to defendants' opposition which is of any legal substance. Although plaintiffs, in the Appendix hereto, will discuss certain individual interrogatories and requests for production, it is their position that since most of defendants' objections are based upon the three issues discussed in this memorandum, those objections must fail if the Court agrees with the position presented by plaintiffs herein.

*Conclusion*

For all of the foregoing reasons, and for those set forth in plaintiffs' opening memorandum in support of the instant motion to compel discovery, plaintiffs' motion for an order compelling discovery pursuant to Rule 37, Federal Rules of Civil Procedure, should be granted, and defendants should be required forthwith to answer those interrogatories and produce those documents described in the proposed order which plaintiffs submitted in support of said motion.

Dated: March 29, 1974.

B. E. Bergesen, III
Fay Stender
Sidney M. Wolinsky

By /s/ B. E. Bergesen, III
Attorneys for Plaintiffs



[*Appendix A*]

In those cases where plaintiffs believe that their position is sufficiently set forth in their opening memorandum or the appendix thereto, or in the foregoing reply memorandum, no further discussion of the individual items which are the subject of this discovery motion will be made. However, where it would seem appropriate to respond to matter contained in Defendants' Opposition, those responses will be set forth in the following pages.

*I. Rule 34 Request for Production of Documents*
*No. 2*

Defendants' position on this item (see pages 28-30 of Defendants' Opposition) is at best confusing. If all of the language is boiled down, however, defendants appear to be saying that most or even all documents setting forth the Adult Authority's standards or criteria are privileged under California Government Code § 6254. That contention, however, has been thoroughly refuted in an earlier memorandum. At this point plaintiffs would simply add that if there are in fact such documents in existence, defendants should say so, and should submit a list of them so the issue of privilege could be litigated in a forthright manner.

*No. 3*

Here defendants engage in a non sequitur. That is, the fact that the procedures in question may be discussed in Policy Statements and Resolutions in no

way disentitles plaintiffs from inspecting additional documents in which these procedures are set forth. Therefore it is difficult for plaintiffs to comprehend the import of defendants' answer.

*No. 6*

This item, discussed fully at pages 13-14 of plaintiffs' opening memorandum, and which is patently relevant to the case, is grudgingly admitted to be so by defendants. Yet even despite this most unusual admission, defendants will say to plaintiffs, and to this Court, only that the memoranda will be made available to plaintiffs by defendants *"if a copy is still in their custody or control."* Defendants' Opposition at 32 (emphasis supplied). At this point, it appears to plaintiffs that there is virtually no way in which they can obtain, from defendants, a straightforward answer on anything, unless this Court insists that they discontinue these evasive tactics.

*No. 9, 10*

This response also (see Defendants' Opposition at 33) furnishes an excellent example of the type of obfuscation which defendants are hiding behind in their effort to avoid producing obviously relevant documents. If such documents do not exist, or are not in the possession, custody or control of defendants within the meaning of Rule 34, they should so state. If such documents do exist, but are in defendants' view privileged, then they should make a statement to that effect, and list the documents involved.



*No. 12*

In passing, plaintiffs only wish to point out the obvious defect in permitting defendants to make available to plaintiffs "all statistics they feel relevant to the subject matter of this action." Defendants' Opposition at 34, in light of the distorted view which defendants have of the case, not to mention defendants own constricted notions of relevancy, discussed in plaintiffs' opening memorandum.

II. *Plaintiffs' Rule 33 Interrogatories*

*No. 2*

Defendants are required to answer Rule 33 interrogatories by furnishing the information that the answering party possesses "after due inquiry." 8 Wright & Miller, *supra,* at 559. "A party is charged with knowledge of what his agents know, or what is in records available to him, or even, for purposes of Rule 33, information others have given him on which he intends to rely in his suit." *Id.* at 561-62. These well settled principles should be easy enough for defendants to follow, and the questions posed at pages 16-17 of their opposition drag yet another red herring across the discovery trail.

*No. 7-40 (Defendants' Opposition at 19-20)*

Here again, the defect in defendants' answer is their insistance upon narrowing the scope of the case to the proceedings to which the seven named plaintiffs were subject, and the individual relief to which each of them might be entitled if such proceedings were defective.

*Gordon No. 41(b) (Defendants' Opposition at 21-22)*

Regardless of what relief Mr. Chatfield may have obtained in another action, plaintiffs are seeking *evidence* with respect to previous hearings held by the Adult Authority. The information sought with respect to this interrogatory probably constitutes, and certainly is reasonably calculated to lead to such evidence.

[Exhibits Omitted in Printing]

[Certificate of Service Omitted in Printing]

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United States District Court
Northern District of California

[Filed April 24, 1974]

[Caption Omitted in Printing]

FINDINGS AND RECOMMENDATIONS

[The Magistrate's Findings and Recommendations, filed April 24, 1974, is omitted in printing this Appendix, and is found in the printed Petition for Writ of Certiorari, Appendix pages xviii-xxii]



United States District Court
Northern District of California

[Filed April 30, 1974]

[Caption Omitted in Printing]

NOTICE OF INTENT TO SEEK REVIEW OF MAGISTRATE'S DECISION AND STATEMENT OF OBJECTIONS

To: The Honorable David R. Urdan, United States Magistrate, Room 18201, 450 Golden Gate Avenue, San Francisco, California 94102; and B. E. Bergesen, III, counsel for plaintiffs, 795 Turk Street, San Francisco, California 94102:

PLEASE TAKE NOTICE that, pursuant to Magistrate's Rule 505(4) the defendants intend to seek review of the Magistrate's Findings and Recommendations of April 24, 1974, in the above-entitled matter.

*Statement of Objections*

Defendants object to the Magistrate's Findings and Recommendations in the following particulars:

I

The Magistrate's Findings and Recommendations compel with defendants to produce documents which are, and answer interrogatories which seek, matters irrelevant to the subject matter of the instant cause of action.

II

The Magistrate's Findings and Recommendations would compel the defendants to produce documents which are, and answer interrogatories which seek, privileged material.

III

Compliance with some of the Magistrate's recommendations would impose an undue burden upon the defendants.

IV

Compliance with some of the Magistrate's Recommendations is impossible because the request of the plaintiffs is not sufficiently detailed to allow the defendants to locate the material sought.

V

The recommended "Protective Order" is too broad to provide sufficient protection for the material required to be produced.

VI

The recommended award of expenses is inappropriate since defendants' opposition to the motion was substantially justified.

The Magistrate's Findings and Recommendations were received by counsel for the defendants on April 25, 1974, the day following their filing. It is defendants' intention to file detailed written objections, with supporting points and authorities with this Court on



or before May 6, 1974, as provided in Local Rule 121(e).

Dated: April 30, 1974

Evelle J. Younger,
Attorney General
of the State of California

Jack R. Winkler
Chief Assistant
Attorney General—Criminal Division

Edward P. O'Brien
Assistant Attorney General

W. Eric Collins
Deputy Attorney General

/s/ William D. Stein
/s/ William D. Stein
Deputy Attorney General
Attorneys for Defendants

WDS:md

[Statement of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed May 6, 1974]

[Caption, Title Page, Topical Index, Table of Cases Omitted in Printing]

REQUEST FOR REVIEW OF MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

On April 24, 1974, Magistrate Urdan, filed his Findings and Recommendations on plaintiff's motion for an order compelling production of documents and further answers to interrogatories. These findings were received by counsel for the defendants on April 25, and pursuant to Magistrate's Rule 505(4), Magistrate Urdan and counsel for plaintiffs were given notice of the defendants' intent to seek this review of these Findings and Recommendations on April 30, 1974.

Pursuant to local Rule 121(e), defendants state the following objections to the Magistrate's Findings and Recommendations:

I

The Magistrate's Findings and Recommendations compel defendants to produce documents and answer interrogatories which seek information, irrelevant to the subject matter of the instant cause of action.

II

The Magistrate's Findings and Recommendations would compel the defendants to produce documents and in some instances answer interrogatories which would disclose privileged information.



III

Compliance with some of the Magistrate's recommendations would impose an undue burden upon the defendants.

IV

The recommended "Protective Order" is too broad to provide sufficient protection for the material required to be produced.

V

The recommended award of expenses is inappropriate since defendants' opposition to the motion was substantially justified.

Dated: May 6, 1974

Evelle J. Younger,
Attorney General of the
State of California
Jack R. Winkler,
Chief Assistant Attorney
General—Criminal Division
Edward P. O'Brien,
Assistant Attorney General
W. Eric Collins
Deputy Attorney General
William D. Stein
Deputy Attorney General

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General
Attorneys for Defendants

## Points and Authorities in Support of Request for Review of Magistrate's Findings and Recommendations

*Preliminary Statement*

Defendants do not present any arguments not presented to the Magistrate.[1] They are aware that this Court has before it plaintiffs' motion, their opposition to that motion and plaintiffs' reply to our opposition. These briefs, less their appendices, total over 112 pages and present detailed legal argument on the issues as they apply to each of the interrogatories and each of the demands for documents. Defendants intend to present here but a brief summary of the relevant portions of their arguments concerning their objections to the Magistrate's Findings and Recommendations.

*The Magistrate's Findings and Recommendations*

Adopting *in toto* plaintiffs' argument the Magistrate has found all of the defendants' objections to the production of documents and to further answers to interrogatories without merit. Rather than setting out extensive legal argument, the Magistrate merely referred to the arguments contained in plaintiffs' motion and in their response to our opposition. The Magistrate has recommended with respect to the motion for production of documents that it be granted with respect to each and every item. The only limitations placed upon this production are to limit the time pe-

[1]Defendants do, however, discuss one new authority, *Clutchette v. Procunier*, ..... F. 2d ..... (9th Cir. No. 71-2357, decided April 25, 1975), which they feel supports their argument concerning relevancy and undue burden.



riod from and after January 1, 1970, and to recommend a protective order with respect to the production of plaintiffs' central files, the personnel files of the defendants who are members or employees of the California Adult Authority and of non-defendant employees. The Magistrate recommended that defendants provide further answers to 30 interrogatories. Plaintiffs' motion with respect to 12 interrogatories was denied.

### I

### The Magistrate's Findings and Recommendations Compel Defendants to Produce Documents and Answer Interrogatories Which Seek Information Irrelevant to the Subject Matter of the Instant Cause of Action.

In opposing this motion it was defendants' position that, though denominated a class action no attempt has been made during the 16 months since the complaint was filed to move this Court to determine that this action may be so maintained. Compare Federal Rules of Civil Procedure 23(e). Hence, we assume that the complaint is limited to the seven named plaintiffs and their allegations that the procedures employed in their individual cases failed to comport with constitutional standards. The Magistrate, however, found that our position misconstrued the subject matter of the case on the grounds that the complaint seeks *relief* more extensive than that envisoned by us. We submit that the subject matter of this litigation must be determined by reference to the allegations of the

complaint, not by a prayer which envisioned a class action.

> In their reply to our opposition, plaintiffs state that "[T]his law suit directly challenges the procedures surrounding the ongoing term fixing, parole granting hearings which are the very heart of this suit * * * . Plaintiffs' central claim that the hearing procedures employed by defendants are constitutionally infirm, and that as a result of this infirmity plaintiffs seek declaratory and injunctive relief to require that defendants henceforth adopt procedures which comport with certain minimal due process standards."

In addition to our relevancy argument set forth in our opposition to plaintiffs' motion, a recent decision of the Ninth Circuit casts considerable doubt on this Court's jurisdiction to entertain a federal civil rights suit based on such allegations and seeking such relief. In *Clutchette v. Procunier,* ..... F.2d ..... (9th Cir. No. 71-2357, April 25, 1974), the Court discusses at length the effect of *Preiser v. Rodriguez,* 411 U.S. 475 (1973); and *Wilwording v. Swenson,* 404 U.S. 249 (1971), on suits by state prisoners charging procedures employed by penal authorities violate due process and equal protection. See attached Opinion, pp. 2-6. The Ninth Circuit concluded that the District Court had jurisdiction to entertain Clutchette's complaint since he did not attack the fact or duration of his confinement, but only procedures which affected the conditions of his confinement. See attached Opinion, pages 3-4. The opinion discusses the relationship between disciplinary proceedings in California state prisons and the length of an inmate's incarceration under the California indeterminate sentence law as administered by the California Adult Authority, the defendants in the instant action. See attached Opinion, p. 4. Finding that the relationship between the imposition of discipline and the postponement of a prisoner's release could not be precisely identified, the panel avoided the jurisdictional bar of *Preiser v. Rodriguez, supra.* See attached Opinion, p. 5-17.



Plaintiffs admit they are challenging procedures having a direct effect on the length of their confinement. We respectfully submit such allegations and prayers for relief are "within the core of habeas corpus attacking the very duration of their physical confinement itself." *Preiser v. Rodriguez, supra* at 487-488. Hence, defendants submit the only discoverable material relevant to this action would be that permitted in a habeas corpus action. See *Harris v. Nelson,* 394 U.S. 286, 297 (1969).

## II

### The Magistrate's Findings and Recommendations Would Compel the Defendants to Produce Documents and Answer Interrogatories Which Seek Privileged Information.

Plaintiffs' interrogatories Nos. 1 and 2 as well as their request for documents No. 7 seek personnel files and personal data for each of the defendants as well as other employees of the California Adult Authority. We urged that these files enjoyed an absolute privilege under California state law. See Calif. Gov. Code

§ 6254(c); Calif. Evid. Code § 1040(b)(1); *Procunier v. Superior Court,* 35 Cal.App.3d 207, 209, 110 Cal. Rptr. 529, 530 (1973). Federal law recognizes a similar privilege with respect to personnel files. Title V, U.S.C. § 552(b)(6). We do not suggest either the California or Federal Public Information Act creates an absolute privilege against the discovery of these documents. Rather, we urge that since the privilege is recognized in both federal and state law, it is clear that there is at least a qualified privilege against discovery and disclosure should not be ordered unless a compelling need is shown and then only after an *in camera* hearing to determine whether that need outweighs the governmental interest in preventing this unquestioned invasion of privacy. See *Committee For Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792 (D.C. Cir. 1971); *Carr v. Monroe Manufacturing Co.,* 431 F.2d 384 (5th Cir. 1970); *cf. Pleasant Hill Bank v. United States,* 58 F.R.D. 97 (W.D. Mo. 1973); *Bredice v. Doctors' Hospital, Inc.,* 50 F.R.D. 249 (D.C. 1970); *Walker v. Liberty Mutual Co.,* 48 F.R.D. 365 (D.C. Wisc. 1970).

Defendants also assert a similar privilege against the disclosure of certain material in the files maintained by the California Department of Corrections on plaintiffs. This claim is based upon California Penal Code section 2081.5 interpreted by the California appellate courts as creating an absolute privilege against their disclosure. See *Yarish v. Nelson,* 27 Cal. App.3d 893, 901-902, 104 Cal.Rptr. 205, 211-212 (1972); *cf. In re Harrell,* 2 Cal.3d 675, 691, 87 Cal.



Rptr. 504, 514 (1970); *Alanis v. Superior Court,* 1 Cal.3d 784, 787, 83 Cal.Rptr. 305, 357 (1970). This absolute privilege has been recently held to extend to litigants. *Procunier v. Superior Court,* 35 Cal.App. 3d 207, 209, 10 Cal.Rptr. 529, 530 (1973), hearing denied; but see *In re Olson,* 37 Cal.Rptr. 529, 530 (1973), petition for rehearing pending.

Defendants disagree with the Magistrate's finding that plaintiffs have made a sufficient showing to be entitled to these documents. Upon reaching that conclusion, however, the Magistrate should have ordered the defendants to produce this information *in camera* so that he could weigh the need for their disclosure against the state's interest in their continuing confidentiality. We respectfully urge this Court to recognize these claims of privilege for, if federal courts will not, they have been effectively rendered meaningless.

> "If this Court were to accept petitioner's contention that this privilege should be approached in an *ad hoc* manner, being dissolved when necessity for the privileged information is shown, and no specific reasons for the upholding of the privilege advanced, then the underlying reasons for the existence of the privilege would be thwarted just as fully as if it did not exist." *Koth v. Perini,* 283 F.Supp. 1 (N.D. Ohio 1968).[2]

[2]The state's interests in the confidentiality of inmate files are many, but three come immediately to mind: (1) the protection of individuals, including informants inside and outside of prison and insuring institutional security. See *Morrissey v. Brewer,* 408 U.S. 471, 487 (1972); *McCray v. State of Illinois,* 386 U.S. 300, 308-309 (1967); *In re Prewitt,* 8 Cal.3d 470, 475-476, 105 Cal. Rptr. 318, 322-323 (1972); *In re Harrell,* 2 Cal.3d 675, 691, 87 Cal. Rptr. 504, 514 (1970), *cert. denied,* 401 U.S. 914; (2) encouraging candor and complete disclosure of information concern-

Plaintiffs' request for documents, Nos. 15, 18, 20, 21, and 22, seek preliminary drafts, notes, inter-agency or intra-agency memoranda to which defendants have asserted the privilege recognized in California Government Code section 6254(a). Compare title V, U.S.C. § 552(b)(5). The purpose for these exemptions is, of course, to encourage the free exchange of ideas during the process of deliberation and policy making. *Soucie v. David,* 448 F.2d 1067, 1077-1078 (D.C. Cir. 1971). The disclosure of such memoranda have been recognized as having a detrimental affect on a governmental agency's decision making process.

> "[A] full and frank exchange of opinion would be impossible if all internal communications were made public. [Agency witnesses] contended, and with merit, that advice from staff assistants in the exchange of ideas among agency personnel would not be completely frank if they were forced 'to operate in [a] fish bowl.'" *Sterling Drug Inc. v. S.T.C.,* 450 F.2d 698, 706-707 (D.C. Cir. 1971) [quoting from 10 (1966) U.S. Congressional and Administrative News, p. 2427].

Upon concluding that the plaintiffs made a sufficient showing of relevancy to be entitled to this information, a finding with which we do not concur, in order to protect the effectiveness of governmental decision-

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ing inmates from both public officials and private citizens, see Calif. Evid. Code § 1040; *Chronicle Publishing Co. v. Superior Court,* 54 Cal.2d 548, 568-570, 7 Cal.Rptr. 109, 121-122 (1960); (3) the requirements of certain statutes providing for the confidentiality of statements and recommendations submitted by the judge, district attorney, and sheriff [California Penal Code sections 3046, 1203.01], or in response to notices given under California Penal Code sections 3022 and 3042, and a limitation respecting the inspection of certain criminal records [Penal Code sections 11105(b), 11120, 11122-11125].



making processes, the Magistrate should have required an *"in camera"* inspection of these materials before ordering their blanket production. Compare *Committee For Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792 (D.C. Cir. 1971).

An additional objection is made to the production of investigative reports by members of the Adult Authority (plaintiffs' request No. 14), since these are reports of investigations conducted by state agencies for correctional purposes. As such they are entitled to the privilege conferred by California Government Code section 6254(f), which is similar to the privilege recognized in title V, U.S.C. section 552(b)(7).

## III

### Compliance With Some of the Magistrate's Recommendations Would Impose an Undue Burden Upon the Defendants.

For the reasons expressed in our opposition to plaintiffs' motion at pages 8 through 14, we again particularly object to the burden imposed upon by the defendants by the production of the documents referred to in plaintiffs' requests Nos. 4, 5, 9, 10, 12, 13, 17, and 19. See also individual discussion of these particular requests in our opposition at pages 31-32, 33-36, 37-38.

## IV

### The Recommended "Protective Order" is Too Broad to Provide Sufficient Protection for the Material Required To Be Produced.

The Magistrate has recommended that a protective order be entered that no central file of any plaintiff

[request No. 1], nor personnel file of any member of the Adult Authority, hearing representative, or executive officer [request No. 7], shall be shown to any person except counsel for the plaintiffs and those personnel employed in their offices, and then only to the extent necessary to the conduct of this litigation.

Defendants' objections to this proposed protective order are several. Initially, it does not include within its scope all of the material which is entitled to protection. Specifically, defendants point out that interrogatories Nos. 1 and 2 demand personal data from the defendants and other employees of the California Department of Corrections. At a minimum, this data should be included in any protective order. Defendants further object to the large number of persons who would have access to the material under this proposed protective order. There are currently five attorneys of record for the plaintiffs in this action. They are B. E. Bergesen, III, Fay Stender, Ezra Hendon, Seigfried Hesse, and Sydney Wolinsky. These attorneys have offices either in San Francisco, Oakland, or Berkeley. At least two, B. E. Bergesen, III, and Sydney Wolinsky, are associated with large law cooperatives [Youth Law Center and Public Advocates, Inc.]. Each of these law offices employs a large number of personnel and uses the services of numerous volunteer students. In view of the large number of persons included in the class "counsel for plaintiffs" and "personnel employed in their offices," defendants respectfully submit that any protective order should be limited to two counsel and one designated investigator



for each whose access to these items should be limited only to that necessary for the conduct of this litigation.

CONCLUSION

Wherefore, for the reasons expressed above, defendants respectfully submit that their opposition to plaintiffs' motion was substantially justified, and that the award of expenses is inappropriate. Defendants respectfully request the Court to signed the attached order.

Dated: May 6, 1974

Evelle J. Younger,
Attorney General of the
State of California
Jack R. Winkler,
Chief Assistant Attorney
General—Criminal Division
Edward P. O'Brien,
Assistant Attorney General
W. Eric Collins
Deputy Attorney General
William D. Stein
Deputy Attorney General
/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General
Attorneys for Defendants

[Proposed Order Omitted in Printing]

[Statement of Service Omitted in Printing]

[Notice of Motion to Compel Discovery Omitted]

In the United States District Court
for the Northern District of California

[Filed May 15, 1974]

[Caption Omitted in Printing]

MOTION TO COMPEL DISCOVERY

Plaintiffs, by their undersigned attorneys, hereby move the Court pursuant to Rule 37 of the Federal Rules of Civil Procedure for an order requiring, first, that members in good standing of the California Bar be allowed to attend Adult Authority sentence-fixing/parole-granting hearings on twenty-four hours notice; second, that defendants tape record all Adult Authority sentence-fixing/parole-granting hearings henceforth until trial commences in the instant action, and third, that plaintiffs' counsel be permitted to inspect at random every 20th file of inmates confined in the California Prison System and for whom a central file is kept.

The members of the California Bar will observe Adult Authority sentence-fixing/parole-granting hearings in accordance with the revised Adult Authority Policy Statement No. 3 annexed hereto as Exhibit 'A' with three modifications. First, members of the California bar in good standing will be allowed to observe hearings on twenty-four hour notice. Second, three such members will be allowed to observe the hearing. Third, the members of the bar observing the hearing will be free to take notes.

The plaintiffs will provide at their expense the tape recorders and tapes necessary to record Adult Authority sentence-fixing/parole-granting hearings. Defendants would assume the responsibility of assuring that



the recorders be continuously recording all that transpires. Specifically, the Department of Corrections employee who serves as clerk to the particular Adult Authority panel will operate the tape recorder.

Plaintiffs did previously, on the 8th day of March, 1974, serve a written request upon counsel for defendants for the first and second discovery procedures. A true and correct copy of said request is annexed hereto as Exhibit B. By a letter dated March 29, 1974, counsel for defendants responded to and denied this request for discovery. A true and correct copy of such letter is attached as Exhibit C.

Plaintiffs did previously on November 5, 1973, serve a written request upon counsel for defendants for inspection of the files as requested herein. A true and correct copy of said request is annexed hereto as Exhibit D. Counsel for defendants responded to and denied this request for discovery and reaffirmed their denial by telephonic conversation on May 2, 1974.

Defendants completely control access to Adult Authority hearings, which are the subject of this litigation, and to the central files for inmates. The procedure, manner, and content of these hearings are the basis of evidence relevant and material to matters involved in this action. Such evidence is absolutely necessary for plaintiffs in preparation for trial and otherwise prosecuting this action.

Dated: May 14, 1974

Respectfully submitted,
/s/ Sidney M. Wolinsky
Sidney M. Wolinsky

[Exhibits A, B, C Omitted in Printing]

[Exhibit D]

Law Offices of
STENDER AND LAPIDES
San Francisco 94133 November 5, 1973

Karl Meyer, Esq.
Deputy Attorney General
6000 State Building
San Francisco, California 94102

Re: Discovery in *van Geldern v. Kerr*

Dear Karl:

The four plaintiffs' counsel in this case met over the weekend and had extensive discussions on how to expedite discovery and proceed to trial in this case. After considerable discussion, we all felt that a reasonable way to proceed, and one that might save a good deal of time all the way round for all concerned, would be if the defendants could stipulate that the counsel in this case (and our designated representatives, whether additional attorneys or law student assistants) have access to the files of some 40-50 selected prisoners,—as to whom we have already developed sufficient information to make it clear to us that there are serious abuses illustrative of the denials of due process we allege in the complaint, and in addition, to every 20th file at CDC institutions in California. This would bring the number of files we look at to approximately 1,000 and would give a good random sample of whether the due process abuses we complain of occur throughout the system and not just in special cases. We believe that these abuses occur systematically, and believe that the suggested method of access



to the files would show this most expeditiously.

Naturally we would expect to treat this information in the strictest of confidence, respecting its confidentiality in all respects, and we would be prepared to stipulate to a protective order indicating that we would not share this information with our clients or with anyone else, but would collect, collate and organize it for presentation to the Court in this case. I do not think that this stipulation would be a problem since we are prepared to respect the confidential nature of the material. The names of these prisoners in every 20th file need not appear, or can be submitted in camera.

We hope that you may be able to explore this suggestion promptly with your clients and that we could hear from you on whether we can get together to work out details, within the next week or so.

Sincerely,
Fay Stender

fs/swm

In the United States District Court for the
Northern District of California

[Filed May 15, 1974]

[Caption Omitted in Printing]

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL DISCOVERY

## FACTUAL CONTEXT

This suit asks for the institution of due process safeguards in the granting of parole similar to those minimum procedures already accorded by over 20 states. The subject of the litigation is the procedure now in fact followed by the Parole Board, including its heavy (and often exclusive) reliance on the central file of the inmate which contains voluminous data put in by guards, District Attorneys, irate wives, prison counselors and a host of other people. Plaintiffs' counsel, by this motion, simply asks that interested members of the Bar in good standing, in limited numbers and under careful restrictions, be given a reasonable opportunity to observe these proceedings, that the proceedings be recorded, and that plaintiffs have an opportunity to inspect only 5% of the available central files upon which determinations are made to confine men to prison or to release them. Accordingly, this motion is essential not only for plaintiffs to present their case as to the central issues of this litigation, but so that the court will have the benefit of a fair and accurate record of the proceedings upon which it is asked to make a constitutional determination.



Indeed, there are substantial dangers to plaintiffs' position in this motion since defendants will be given a golden opportunity to be on their "best behavior" for the limited period of time that they will not be operating in secret. Be that as it may, a court can hardly make a determination while defendants deprive the judiciary of the opportunity to know about the procedure being discussed.

It is known that a median Adult Authority sentence-fixing/parole-granting hearing lasts less than ten minutes and that the decision is made in less than five minutes. It is also known that Adult Authority members generally are men whose career have been spent in law enforcement and that they base their decisions on central files and reports which contain rumor, innuendo, and unsubstantiated charges. And it is recognized that inmates who appear before the Board are under a great deal of stress, and not infrequently, under heavy medication. However, although those few experts who have developed sufficient familiarity with Adult Authority proceedings to write about them report that the members and representatives make parole decisions totally arbitrarily, it is necessary that the discovery requested herein be ordered so that the court can make a fair decision as to the truth of this allegation. *See,* Mitford, ***Kind and Usual Punishment in California,*** The Atlantic (March 1971), Exhibit 'E'. The same is true as to reports that the central files contain almost exclusively adverse information, that inmates are often tongue-tied and inarticulate before the Board, and that often inmates are not explicitly

informed as to the concerns of the Board nor given an opportunity to refute demonstrably untrue charges. *See,* Parsons-Lewis, *Due Process in Parole-Release Decisions,* 60 Calif. L.Rev. 1518 (1972), Exhibit 'F'.

ISSUES

The complaint herein sets forth numerous factual allegations that cannot be fully established except through evidence gathered from observation of Adult Authority hearings. For example, it is alleged in Paragraph 16(d) of the Complaint that "before an Adult Authority Panel, many inmates are so fearful, tongue-tied or lacking in the ability to organize and articulate their position that they are unable to make an effective presentation of their case, or even on occasion respond accurately to questions posed by the panel."

Similarly, Paragraph 16(e) of the Complaint alleges that "In almost every hearing the panel members do not have sufficient time (i) to thoroughly review the relevant written material before them, (ii) to conduct a thorough and meaningful interview with the inmate, or (iii) to arrive at an informed decision pursuant to a discussion of the case."

Again, Paragraph 16(g) of the Complaint alleges that Adult Authority decisions are based upon "(i) mere whim and caprice, reflecting primarily the panel member's personal predilections, (ii) discriminatory considerations, reflecting primarily the panel member's own political, racial, and other biases and/or (iii) criteria which in fact do not correspond to the likelihood of success on parole, and therefore are not



based upon the "good cause" required by State law and the Federal Constitution."

As a final example, Paragraph 2(c)(3) alleges that "Decisions are made in less than five minutes and without any extended or meaningful discussion of the case."

The central issue in this action is thus the legality and constitutionality of a procedure—the Adult Authority decision-making process. This order of the court compelling defendants to record hearings and permit members of the bar to observe the Adult Authority hearings is necessary for plaintiff in putting before the court the issues most central to this litigation.

In challenging the Adult Authority decision-making process, plaintiff must overcome two obstacles. First, the precise nature of Adult Authority hearings and deliberations remains semi-secret. Second, the court must be presented with evidence that accurately conveys the Adult Authority processes.

An analogous problem of developing evidence to establish the facts about semi-secret procedures arises in a range of tort actions involving injuries resulting from manufacturing processes. Courts in such actions commonly order discovery by means of observing, testing, and photographing the manufacturing process. *Cox v. E. I. DuPont de Nemours & Co.,* 124 N.Y.S. 2d 256 (1953) [ordering inspection of a manufacturing process by plaintiff in a products liability case]; 4A *Moore's Federal Practice,* Para. 34.19[5] (2d ed.

1974). Likewise, courts have often ordered production of tape recordings and transcripts through discovery motions in a variety of situations. ***LaMorte v. Mansfield,*** 438 F.2d 448 (2d Cir. 1971); ***Haaf v. Grams,*** 355 F.Supp. 542 (D. Minn. 1973); ***White v. Jaegerman,*** 51 F.R.D. 161 (S.D.N.Y. 1970); ***Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.,*** 291 F.Supp. 247 (E.D. Pa. 1968); ***United States v. Ben Grumstein & Sons Co.,*** 137 F.Supp. 197 (N.N.J. 1956); ***Chase v. Patron Transmission Co.,*** 304 N.Y.S. 2d 866, 61 Misc. 2d 200 (1969); ***Loughlin v. Miller,*** 284 N.Y.S. 2d 197, 55 Misc. 2d 12 (1967); ***Baron v. Kings-Suffolk Realty Corp.,*** 158 N.Y.S. 2d 923, 4 Misc. 2d 587 (1957).

Inmates' central files, like any other documents that might tend to support plaintiffs' claims, narrow or clarify the basic issues, or reveal facts relevant to those issues, are discoverable under the Federal Rules of Civil Procedure. See, ***Federal Maritime Commission v. Anglo-Canadian Shipping Co.,*** 335 F.2d 255, 260 (9th Cir. 1964); ***Speedrack Inc. v. Baybarz,*** 45 F.R.D. 254, 257 (E.D. Cal. 1968); ***In Re Prewitt,*** 8 Cal. 3d 470 (1972); ***Olson v. Pope,*** No. 1 Crim. 11312, filed March 7, 1974; ***Charles v. Patterson,*** C-71-1337 SAW (order filed May 12, 1972); 4A ***Moore's Federal Practice*** para. 34.09 (2d edition 1974) [citing cases]. Likewise, plaintiffs in this action should be permitted to undertake discovery that will result in the evidence necessary for adjudication of the major factual and legal issues raised in the Complaint.



Stubborn obstacles blocking access of parties to evidence is the antithesis of the guiding philosophy of federal discovery—that a trial is not a sporting event but a search for the truth. ***Clevite Corp. v. Beckman Instruments, Inc.,*** 257 F.Supp. 50, 52 (S.D. Cal. 1966); ***Tiedman v. Pegment Corp.,*** 253 F.2d 803, 808 (4th Cir. 1958). Once the discovery sought is shown to be relevant to the subject of the litigation, as clearly is the case with the present motion, the federal rules relating to discovery are to be liberally construed. ***Martin v. Reynolds Metals Corp., supra,*** at 56; ***Hickman v. Taylor,*** 329 U.S. 495, 507, 67 S.Ct. 385, 9 L.Ed. 451 (1947). Inconvenience and expense are not sufficient reasons for denying discovery. ***United States v. American Optical Company,*** 39 F.R.D. 580, 587 (N.D. Cal. 1966); ***Service Liquor Distributors, Inc. v. Calvert Distillers Corp.,*** 16 F.R.D. 507, 509 (S.D.N.Y. 1954); 4A ***Moore's Federal Practice*** para. 34.19[2] (2d edition 1974) (cases cited in footnote 9). Moreover, since ***in camera*** review of materials produced and issuance of a protective order are possible, an allegation that parts of the material sought are confidential is not a valid excuse for refusing discovery. ***Jack Winter, Inc. v. Koratron Co., Inc.,*** 54 F.R.D. 44 (N.D. Cal. 1971); ***Petition of Massachusetts Trustees of Eastern Gas & Fuel Associates,*** 200 F.Supp. 625, 626 (E.D. Va. 1962); ***Heinz v. United States,*** 9 F.R.D. 291, 295 (N.D. Cal. 1949). In practice, discovery is limited only by the issues to be litigated. ***Securities & Exchange Commission v. Los Angeles***

*Trust Deed & Mortgage Exchange,* 24 F.R.D. 460 (S.D. Cal. 1960). Discovery should result in disclosure of the facts to the fullest extent possible, providing access to anything that is evidence in the case. *United States v. Proctor & Gamble Co.,* 356 U.S. 677, 683, 78 S.Ct. 983, 2 L.Ed. 2d 1077 (1958); *Hickman v. Taylor, supra* (J. Jackson concurring); *United States v. Certain Parcels of Land,* 15 F.R.D. 224, 237 (S.D. Cal. 1954).

Present Adult Authority procedures and practices are clearly material to the factual and legal issues in this case. As all parties to this case are well aware of, Magistrate Urdan made precisely this ruling in his April 24, 1974, Findings and Recommendations on a motion by plaintiff to compel production of documents and answers to interrogatories. (Exhibit "G"). Magistrate Urdan wrote:

> [I]n the defendants' view the subject matter of the complaint concerns only past correctional procedures limited to whether proceedings relating to the seven named plaintiffs regarding their parole comported to applicable standards of due process. This objection is not valid because it misconstrues the subject matter of the case. The complaint seeks relief more extensive than that envisoned by the defendants, and therefore the defendants' objection to some of the plaintiffs' discovery on the ground of irrelevancy is without merit. Exhibit "G" at p. 1-2.

Any common sense reading of the Complaint filed by plaintiff herein—and, in particular, the injunctive relief which they have requested—makes it crystal clear



that the constiutionality of present Adult Authority proceedings is at issue. In fact, the sentence-fixing/parole-granting hearings which this discovery motion deals with have been treated by defendants as totally unaffected by *Morrissey v. Brewer,* 408 U.S. 471 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). Further, as a class action, this case obviously challenges present procedures affecting members of the class. However, even if the only issue were pre-*Morrissey* procedures, inspection of present procedures is an appropriate form of discovery with the defendant having a chance at trial to prove that the procedures have changed. *Field v. B. F. Goodrich Co.,* 124 N.Y.S. 2d 256 (1953).

Recording all sentence-fixing/parole-granting procedures is not an exceptional undertaking given the supposedly public nature of the proceedings. In fact, twenty states keep verbatim records of all parole-release hearings. See Exhibit 'H'.

Any claim by the defendants that Adult Authority sentence-fixing/parole-granting hearings are not public is both unprecedented and specious. The Adult Authority's policy statement on "Visitors and/or Observers Attending Adult Authority Hearings" states that "the Adult Authority . . . . has *since its inception* followed the policy of inviting as its official guests, legislators, judges, members of grand juries, law enforcement officials, prospective employers of parolees, union officials, representatives of the press, educators and other interested persons to attend its hearings." (italics added). This consistent policy of allowing

observers at Adult Authority hearings has included a wide range of persons, in fact apparently limitless categories of interested persons. Particularly noteworthy is the specific mention of the press. Certainly if the press is invited to observe hearings, the hearings cannot be viewed by the defendants as other than public.

Dated: May 15, 1974

Respectfully submitted,

/s/ Sidney M. Wolinsky

Sidney M. Wolinsky

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[Exhibit E Omitted in Printing. The Text of the Exhibit is Published in the Atlantic Monthly, March 1971, pages 45-52.]

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[Exhibit F Omitted in Printing This Appendix. The Text of the Exhibit is Published in the California Law Review, Vol. 60, pages 1578-1529 (1972).]

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[Exhibit G Omitted in Printing This Appendix The Text of the Exhibit Appears in the Printed Petition For Writ of Certiorari, Appendix, pages xviii-xxii.]



[Exhibit H]

## SELECTED CHARACTERISTICS OF PAROLE-RELEASE HEARINGS FOR FELONY OFFENDERS IN THE UNITED STATES

### JANUARY 1972

| Jurisdiction | Counsel Permitted at Hearing | Witnesses Permitted at Hearing | How Inmate Informed of Decision | Reasons for Decision Recorded | Verbatim Record of Hearing Made |
|---|---|---|---|---|---|
| U.S. Board of Parole | no 30 | no 34 | after hearing (c) | no | yes |
| Alabama* | no | no | in person (d) | no | no |
| Alaska | yes 21 | no | after hearing | no | no |
| Arizona | yes | yes 17 | in person | no | no |
| Arkansas | yes | yes | after hearing | yes | no |
| California | no | no | after hearing | no | no |
| California Women | no | no | in person | no | no |
| Colorado | no | no | after hearing | no | yes |
| Connecticut | no | no | in person | no | yes |
| Delaware | no | no | after hearing | yes | no |
| District of Columbia | no | no | after hearing | no | yes |
| Florida | yes | yes | after hearing | no | yes |
| Georgia | — | — | no hearings | — | — |
| Hawaii | — | — | no hearings | — | — |
| Idaho | yes | yes | in person | no | yes |
| Illinois | yes | no (b) | after hearing | no | yes |
| Indiana | no | no | in person | no | no |
| Indiana Women | no | no | in person | no | yes |
| Iowa | no | no | in person | no | no |
| Kansas | no | no | after hearing | no | no |
| Kentucky | no | no | after hearing | yes (e) | no |
| Louisiana | yes | yes | in person | no | no |
| Maine | no | no | after hearing | no | no |
| Maryland | no (a) | no | in person | yes | no |
| Massachusetts | no | no | in person | no | no |
| Michigan | no | no | in person | no | no |
| Minnesota | no | no | in person | no | no |
| Mississippi* | yes | yes | after hearing | no | yes |
| Missouri | no | no | after hearing | yes | yes |
| Montana | no | no | after hearing | no | no |
| Nebraska | yes | yes | in person | no | yes |
| Nevada | yes | yes | after hearing | no | no |

*Selected inmates are chosen for interview.

(a) Law students permitted.

(b) In special cases board may elect to allow specific witnesses.

(c) "After hearing" means notification given by mail of third party.

(d) "In person" means by parole board members at the hearing.

(e) Reasons recorded only if parole denied.

| Jurisdiction | Counsel Permitted at Hearing | Witnesses Permitted at Hearing | How Inmate Informed of Decision | Reasons for Decision Recorded | Verbatim Record of Hearing Made |
|---|---|---|---|---|---|
| New Hampshire | yes | yes | in person | no | yes |
| New Jersey | no | no | after hearing | no | no |
| New Mexico | no | no | after hearing | yes | no |
| New York | no | no | after hearing | no | yes |
| North Carolina* | yes | yes | after hearing | no | yes |
| North Dakota | yes | yes | after hearing | yes | yes |
| Ohio | no | no | after hearing | no | no |
| Oklahoma | yes | yes | after hearing | no | no |
| Oregon | no | no | in person | no | no |
| Pennsylvania | no | no | after hearing | yes | no |
| Rhode Island | yes | no | after hearing | yes | no |
| South Carolina | yes | yes | in person | no | yes |
| South Dakota | yes | yes | after hearing | no | no |
| Tennessee | yes | yes | after hearing | no | no |
| Texas | — | — | no hearings | — | — |
| Utah | yes | yes | in person | no | yes |
| Vermont | yes | no (b) | in person | no | yes |
| Virginia | no | no | after hearing | no | no |
| Washington | no | no | in person | yes | no |
| West Virginia | no | no | in person | yes | yes |
| Wisconsin | no | no | in person | no | no |
| Wyoming | yes | yes | after hearing | no | yes |

[Statement of Service Omitted in Printing]



United States District Court
Northern District of California

[Filed June 3, 1974]

[Caption Omitted in Printing]

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY

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PRELIMINARY STATEMENT

In a document entitled, "Motion to Compel Discovery" plaintiffs request that:

(1) Any members in good standing of the California Bar be allowed to attend in groups of three any Adult Authority sentence fixing or parole granting hearing conducted between now and the time trial commences in this action;

(2) The Adult Authority be ordered to tape-record all sentence fixing or parole granting hearings conducted between now and the time trial commences in this action;

(3) Counsel for plaintiffs be permitted to inspect at random every 20th file of inmates confined in the California prison system.

For the reasons which follow, plaintiffs' motion is without merit and should be denied.

## Argument

### I

### The Adult Authority Has Taken Steps to Accommodate the Interests of Attorneys Who Wish to Observe Parole Consideration Hearings.

In response to requests for counsel for plaintiffs, from a Committee of the San Francisco Barristers' Association, and from Alan M. Katz, an employee of Mr. Wolinsky, the Adult Authority has taken steps to schedule opportunities for attorneys to observe Adult Authority parole consideration hearings.

Plaintiffs' motion to compel exceeds the scope of the request upon which it is premised. Mr. Katz' request made on behalf of Mr. Wolinsky and communicated to Mr. Joseph Spangler limits itself to three days of sentence fixing parole granting hearings during the month of May, 1974, and limits itself to the attendance of Mr. Wolinsky and of Mr. Katz. A copy of this letter to Mr. Spangler is attached hereto as Exhibit A.

Similarly, a request of Howard Berman, Chairman of the Prisons and Jails Committee of the San Francisco Barristers' Club, was communicated to the Adult Authority on May 1, 1974, and in this request Mr. Berman listed eight attorneys who wish to observe parole hearings during the month of May. A copy of Mr. Berman's letter is attached hereto as Exhibit B. Mr. Berman's letter was followed by an announcement in the "Barristers' Bailiwick", which sought volunteer attorneys to visit San Quentin "in the next few weeks to help compile discovery data in *VanGeldern v. Kerr,* a suit currently before the federal northern district challenging lack of due process in Adult Authority appearances." A copy of this announcement and the Bailiwick is attached hereto as Exhibit C.



On May 8, a telephonic communication was received by Mr. William Stein of this office from Mr. Bergesen, counsel for plaintiffs, which requested dates for attorneys observing Adult Authority hearings at San Quentin during the month of May. Mr. Stein's memorandum of this phone call is attached hereto as Exhibit D.

On May 2, 1974, Mr. Ron Silliman of the "Committee for Prison Humanity and Justice" communicated an interest on his behalf and on behalf of two associates to observe "a day's hearings sometime in late May." A copy of Mr. Silliman's communication is attached hereto as Exhibit E.

On March 8, 1974, Mr. Wolinsky wrote a letter to Mr. William Stein of this office requesting "that any interested members of the California Bar in good standing be allowed to observe Adult Authority proceedings on 24-hour's notice." A copy of this letter is attached hereto as Exhibit F and a copy of Mr. Stein's reply to it is attached hereto as Exhibit G. Mr. Stein's reply expresses a belief that Mr. Wolinsky's sweeping request could be accommodated within reasonable limits and within the confines of Adult Authority Policy Statement No. 3, the text of which is attached hereto as Exhibit H.

The Adult Authority has and will continue to take reasonable steps to accommodate the interests expressed by counsel in the above communications. How-

ever, in doing so, the Adult Authority will not abandon the principles and provisions in Policy Statement No. 3. For these reasons, plaintiffs' motion under Rule 37 is unnecessary and should be denied.

## II

### Plaintiffs' Motion Respecting the Attendance of Attorneys at Adult Authority Hearings Can Be Granted Only by a Three-Judge Court.

Plaintiffs' motion to compel demands that attorneys' attendance at Adult Authority hearings be allowed on 24-hours' notice and that the attorneys will be permitted to take notes during the hearing. Adult Authority Policy Statement No. 3 revised and reissued on April 24, 1967, states:

> "2. Conduct of Visitors: They must be informed of the confidentiality of the case data and material covered in the interview. Visitors are requested to refrain from moving about, whispering, taking notes or talking to the inmate during the interview."

Insofar as scheduling is concerned, Policy Statement No. 3 contemplates that more than 24-hours notice may be required because of other persons who may wish to observe hearings and because of limitations of facilities.

Policy Statement No. 3 also precludes visitors who may have a personal interest in the case being heard. Policy Statement No. 3, paragraph number 3C. (Exhibit H attached.) Since plaintiffs envision this as a class action (although no determination of permission to so proceed has been requested or made), and



because the classes as described in the complaint encompass every inmate, it would appear that counsel for plaintiffs, and their designees, would *ipso facto* have a personal interest in each hearing held. We might add that the interests expressed by Mr. Berman on behalf of the San Francisco Barristers' Club in observing Adult Authority hearings was made at the urging of Mr. Bergesen, or at least we are so informed by Mr. Berman. This is also indicated by the text of the announcement in the "Barristers' Bailiwick" attached hereto as Exhibit C. It is this circumstance which caused some delay in accommodating the interests expressed by Mr. Berman in attending Adult Authority hearings. We subsequently had conversations with Mr. Bergesen which resulted in an agreement that the attorneys participating in the Barristers' project will be neutral observers and not in any sense agents of counsel for plaintiffs in this action. Following this conversation a memorandum was sent to the Adult Authority recommending that the Barristers' project be accommodated. A copy of that memorandum is attached hereto as Exhibit I.

In any event, to accommodate plaintiffs' motion in its entirety would require a determination that certain of the provisions in Policy Statement No. 3 are invalid and inoperable. This policy statement was adopted by a unanimous vote of the Adult Authority members sitting en banc and as such constitutes a duly adopted rule of state-wide application which can be overturned only by a three-judge district court. Title 28, United States Code sections 2281, 2284.

## III

### Plaintiffs' Demand That Proceedings Be Recorded Amounts to an Improper Request For a Mandatory Injunction.

Plaintiffs' second demand, that all Adult Authority parole granting hearings between the present time and the time of commencement of trial be recorded amounts to a demand for mandatory injunctive relief which is improper and inappropriate as an aid to discovery. See, Moore's *Federal Practice,* Vol. IVA, para. 34.19[4], pp. 34-113.

Plaintiffs' confession that the allegations in paragraph 16 of the complaint cannot be fully established except through evidence gathered from Adult Authority hearings confesses that, contrary to the statement in the complaint, these allegations are based on information and belief, the allegations are in fact based on rumor and conjecture. If the allegations were truthfully based on information and belief, plaintiffs' contention at trial could be established by informing the court of the source of such information and belief. Defendants have no control over the allegations plaintiffs may wish to include in a complaint and defendants should not be subjected to sweeping and intrusive discovery demands apparently necessitated by allegations which are advanced irresponsibly and without foundation.

Each of the plaintiffs have themselves participated in Adult Authority proceedings and are free to describe their experiences through testimony at trial.



Similarly, plaintiffs are free to subpoena other inmates who have participated in such proceedings to have them give descriptions by way of testimony at trial.

The recording of these proceedings, and especially the indiscriminate recording of these proceedings, is intrusive and unnecessary, would encumber the proceedings, and would contravene the policy set forth in Adult Authority Policy Statement No. 3. Policy Statement No. 3, a copy of which is attached hereto as Exhibit H, proscribes visitors taking notes during the proceedings. This proscription *a fortiori* proscribes the recordation of all the proceedings.

Additionally, the proposed order submitted by plaintiffs with their moving papers would require recordation not only of the proceedings in the presence of the inmate, but also the consultations among the panel members in the absence of the inmate. Such recordation intrudes indiscriminately not only on the interests of the inmates but also on the interests of the panel members in discussing the cases with candor among themselves. Plaintiffs have no more legitimate interest in recordation of such conversations than they would of recordation of all conferences judges may have with judges or with their law clerks respecting litigation in their courts.

Plaintiffs cite no authority and we are aware of no authority which states that the Constitution requires verbatim recordation of such correctional proceedings. That some jurisdictions may elect to do so voluntarily is irrelevant. The only question in this action is

whether the Constitution requires such recordation and it does not.

## IV

### Only a Three-Judge District Court Would Have Jurisdiction to Require the Recordation Demanded by Plaintiffs.

Plaintiffs' demand that all Adult Authority parole consideration hearings which occur between the present time and the time of commencement of trial be recorded contravenes the provisions of Adult Authority Policy Statement No. 3. This policy statement was adopted in April of 1967 by the unanimous vote of the membership of the Adult Authority sitting en banc. It constitutes a duly adopted rule of procedure of statewide effect. The provisions of Policy Statement No. 3, therefore, can be overturned only by a three-judge district court. Title 28, USC §§ 2281, 2284.

A provision in Policy Statement No. 3 is that visitors at Adult Authority hearings may not take notes. *A fortiori* the policy statement would proscribe the recordation by visitors of all that occurs at the proceedings. By demanding that the recordation be done by a panel member and then immediately submitted for examination by counsel for plaintiffs, plaintiffs are attempting to demand by indirection what cannot be properly accomplished directly.

Whether or not characterized as a discovery device, this demand of plaintiffs would require panel members to act in contravention of the provisions of Policy Statement No. 3 and this can only be ordered by a three-judge court as indicated above.



Plaintiffs weak ascertions that the Adult Authority proceedings are public are without foundation. Again, we refer the court to text of Policy Statement No. 3 where note taking is proscribed and all visitors are required to be informed of the confidentiality of the case data and material covered in the interview (PS No. 3, para. 2). Similarly, all visitors and observers must identify themselves by name and official position or other reference data (PS No. 3, para. 1), and will not be permitted to attend any session where they have an actual interest in the inmate appearing before the panel (PS No. 3, para. 3C). Finally, no visitors are allowed where the inmate who is to appear before the panel objects to their presence (PS No. 3, para. 6).

## V

### Plaintiffs' Demand for Access to Every 20th Inmate's File Is Without Foundation and Must Be Denied.

Plaintiffs' final demand in the motion to compel is that counsel be provided access to every 20th file of inmates in the California correctional System. We note here the the files of the seven-named plaintiffs have been made available for their inspection. The provision of these files for these purposes is consistent with the scope of the opinions, relied on in plaintiffs' motion to compel, in *In re Prewitt,* 8 Cal.3d 470 (1972); and in *Olson v. Pope,* 37 Cal.App.3d 783 (1974).

However, plaintiffs' demands to inspect indiscriminately the files of over 1,000 other inmates is totally without foundation and, indeed, lacks even any ex-

pression of legitimate interest in plaintiffs' moving papers.

Plaintiffs' demand to inspect at random every 20th file of an inmate incarcerated in California's prison system is necessarily based on the premise that they have a right to access to every file. There is nothing in any of the cases cited in plaintiffs' points and authorities (Plain's P. & A., p. 5), including cites to *In re Prewitt, supra,* and *Olson v. Pope, supra,* that would support any such right. It is one thing for an inmate to discover the contents of his own file insofar as they relate to a proceeding in which he is a party. Such discovery is permitted in California under *Olson v. Pope, supra,* 37 Cal.App.3d 783, and under *In re Prewitt, supra,* 8 Cal.3d 470 (1972). However, it is quite another thing for an inmate or his counsel to have access to and examine the contents of files of all other inmates.

There are valid reasons for defendants' objections to plaintiffs' demands for a blanket access to the file of other inmates. Defendants have a valid interest in protecting individuals, including informants inside and outside of prison, and in insuring institutional security. See, *Morrissey v. Brewer,* 408 U.S. 471, 487 (1972); *McCray v. Illinois,* 386 U.S. 300, 308-309 (1967); *In re Olson, supra,* 37 Cal.App.3d at 788. Defendants also have a valid interest in preserving confidentiality of inmates' central files for the purpose of encouraging candor and complete disclosure of information concerning inmates from both public officials and private citizens. See, Cal. Evid. Code § 1040; *In re Olson,*



*supra,* 37 Cal.App.3d at 783. Similarly, defendants have a valid interest in preserving confidentiality as required by California statutes, e.g., the confidentiality of statements and recommendations submitted by judges, district attorneys and sheriffs under California Penal Code sections 3046 and 1203.01, statements from other parties in response to notices given under California Penal Code sections 3022 and 3042, and statutory limitations respecting the inspection of criminal records under California Penal Code sections 11105(b), 11120, and 11122-11125.

In *In re Prewitt, supra,* and in *Olson v. Pope, supra,* the California courts required disclosure after balancing the interests of a particular inmate in access to his records for particular purposes against the interests of the Department of Corrections and the Adult Authority in preserving confidentiality. Similarly, in the instant action the named plaintiffs have an interest in discovering from their files the information which may have been relied on by authorities in making decisions affecting those seven inmates. However, the instant action expresses no valid interest of inmates who are not plaintiffs and expresses no basis for granting to these plaintiffs access to other inmates' files.

An inmate's file contains information the disclosure of which would constitute as much an invasion of privacy as would the disclosure of information typically contained in personnel files. Both federal law, Title 5, United States Code section 552(b)(6); cf. *Cowles Communications, Inc. v. Department of Justice,* 325 F.Supp.726 (N.D. Cal. 1971); *Sterling Drug, Inc. v.*

*FTC,* 450 F.2d 698 (D.C. Cir. 1971); *Soucie v. David,* 448 F.2d 1067, 1076 (D.C. Cir. 1971), and California law, California Evidence Code section 1040; California Government Code sections 6250-6260; cf. *Procunier v. Superior Court,* 35 Cal.App.3d 207, 110 Cal.Rptr. 529 (1973), recognize a privilege, or at least a qualified privilege, respecting the inspection of personnel records insofar as this would involve an unwarranted invasion of privacy. Thus, even if there is no absolute privilege under state or federal law, there is a qualified privilege such that disclosure should be ordered only in cases of compelling need and then only after an *in camera* hearing to determine whether requirements of public interest are such as to outweigh governmental interests and interests in privacy. See, *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792 (D.C. Cir. 1971); *Pleasant Hill Bank v. United States,* 58 FRD 97 (W.D. Wisc. 1973); *Bredice v. Doctors' Hospital, Inc.,* 50 FRD 249 (D. Wisc. 1970); *Walker v. Liberty Mutual Company,* 48 FRD 365 (D. Wisc. 1970).

Plaintiffs have been allowed access to their central files. We urgently request that plaintiffs' demand for access to the files of all other inmates be denied or at least denied pending an *in camera* review of the files sought to be examined. It would be an unconscionable invasion of privacy and of valid governmental interests to grant full access to these inmate files without any knowledgeable balancing by the court of the competing interests involved.



## VI

### The Discovery Demanded by Plaintiffs Would Violate Defendants' Fourth Amendment Rights.

Federal civil discovery is limited not only by considerations under Rule 26, Federal Rules of Civil Procedure, but also by the scope of protection afforded by the Fourth Amendment. See, *Security and Exchange Commission v. Los Angeles Trust D & M Exhange,* 24 FRD 460, 463 (S.D. Cal. 1959).

Plaintiffs' demands for recordation of all hearings and panel discussions and for access to all inmates' files are supported neither by probable cause nor by specificity as to information and documents to be disclosed. In accordance with the requisites of the Fourth Amendment, such discovery should be permitted only by order of the court and then only after plaintiffs have made a showing of probable cause for need for the documents and information to be recorded and also only if the court order identifies with specificity the documents subject to examination and copy and the proceedings subject to recordation.

Defendants [sic] also urge that recordation such as demanded in plaintiffs' motion would be tantamount to the indiscriminate bugging of proceedings and areas in violation of the Fourth Amendment. See, *Katz v. United States,* 389 U.S. 347 (1967).

## Conclusion

For all of the above reasons, defendants respectfully submit that plaintiffs' motion to compel should be denied in its entirety and that plaintiffs' request for fees and expenses for the making of the motion also be denied.

Attached here to are proposed orders for signature by the United States Magistrate or the United States District Judge.

Dated: June 3, 1974

Evelle J. Younger,
Attorney General of the
State of California

Jack R. Winkler,
Chief Assistant Attorney
General—Criminal Division

Edward P. O'Brien
Assistant Attorney General

John T. Murphy
Deputy Attorney General

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General
Attorneys for Defendants

KSM: pm

[Declaration of Service Omitted in Printing]

[Exhibits Omitted in the Printing of this Appendix]



## In the United States District Court for the Northern District of California

[Filed June 5, 1974]

[Caption Omitted in Printing]

### Memorandum of Points and Authorities in Support of Plaintiffs' Opposition to Defendants' Request for Review of Magistrate's Findings and Recommendations.

As defendants acknowledge at page 4 of their request for review of magistrate's findings and recommendations (hereinafter referred to as defendants' "Request for Review"), defendants are not presenting any new arguments on a matter which has already been fully briefed by both sides. Consequently, plaintiffs will restrict themselves, in this brief reply, to commenting upon a few contentions set out in defendants' request for review, and bringing to the Court's attention (1) the difficulty which they have encountered in inspecting even those few documents which defendants have ostensibly made available to them, and (2) several recent legal developments which bear upon the instant motion.

1. *The Relevance of the Clutchette Decision*

Defendants make a half-hearted attempt to read the Ninth Circuit's recent decision in *Clutchette v. Procunier,* ..... F.2d ..... (9th Cir. No. 71-2357, April 25, 1974), as requiring plaintiffs to proceed in this matter by way of habeas corpus (after first exhausting state court remedies), rather than under Section 1983. It is plaintiffs' submission, however, that the thrust

of the *Clutchette* opinion is exactly to the contrary, and that it affords support for plaintiffs maintaining this action under the Civil Rights Act.

In *Clutchette,* the Ninth Circuit noted that the effect of a disciplinary proceeding upon a state prisoner "can and sometimes does cancel a previously set parole date or reset the inmate's sentence to a statutory maximum on the basis of even minor disciplinary actions." *Clutchette v. Procunier, supra,* opinion at 4-5.* However, the court found that the potential effect of disciplinary sanctions on parole dates and length of sentence was not sufficiently clear cut so that, under *Preiser v. Rodriguez,* 411 U.S. 475 (1973), the *Clutchette* plaintiffs would be required to seek their relief through habeas corpus. That reasoning applies in the same way to the instant case, where none of the named plaintiffs attack the fact or duration of their confinement, but only the defective procedures followed by the California Adult Authority which *may*—in exactly the same fashion as the disciplinary procedures invalidated in *Clutchette*—result in a given prisoner serving a longer term of imprisonment. Since the nexus between the parole hearings and the length of a prisoner's sentence is just as nebulous in the instant case as it is in the *Clutchette* situation, the Ninth Circuit's opinion in *Clutchette* justifies, if indeed it does not require, plaintiffs in the instant case to proceed under Section 1983. In addition, plaintiffs note in passing the nature of the declaratory and injunctive relief sought in this class action, which can be awarded only under Section 1983.

*The *Clutchette* opinion, and the pagination thereof, referred to in this memorandum is that attached to defendants' request for review.



2. *No In Camera Inspection is Required*

In their request for review, defendants suggest that no documents should be turned over to plaintiffs until they have been inspected by the Court pursuant to an *in camera* review. However, the primary authority cited by defendants does not stand for the proposition that such a review is a prerequisite to discovery of documents for which a governmental privilege has been claimed. For example, the case of *Carr v. Monroe Mfg. Co.,* 431 F.2d 384 (5th Cir. 1970), is silent on the point, and the case of *Committee for Nuclear Responsibility Inc. v. Seaborg,* 463 F.2d 788, 792 (D.C. Cir. 1971), is at best authority for the proposition that an *in camera* review is within the court's discretion. Indeed, the court in *Seaborg* specifically stated that "[o]f course, the parties seeking discovery must make a preliminary showing of necessity to warrant even *in camera* disclosure * * *." *Committee for Nuclear Responsibility Inc. v. Seaborg, supra,* 463 F.2d at 792. In the instant case, however, defendants have made no *showing* whatever that any of the documents are in fact privileged, and certainly no showing to justify an *in camera* review of these documents by the Court. Consequently, it would be inappropriate and unduly time-consuming for the Court to undertake such a review at this time.

3. *Other Recent Orders of a Similar Nature*

Attached as Exhibits A through D to this memorandum of points and authorities are the following documents:

A. Findings and recommendations of Magistrate Urdan in the case of *Taylor v. Breed,* No. C-70 1522 ( JC, dated March 25, 1974;

B. Supplement to the aforementioned findings and recommendations by Magistrate Urdan, dated April 9, 1974;

C. Order in the *Taylor* case signed by Judge Oliver J. Carter, dated May 15, 1974, adopting the aforementioned findings and supplement thereto in the *Taylor* case; and

D. Findings and recommendations of Magistrate Woodruff in the case of *Gonzalo v. Procunier,* No. C-73 1422 SAW.

In both the *Taylor* and *Gonzalo* cases, the respective magistrates recommended that the Court issue an order pursuant to Rule 37, Federal Rules of Civil Procedure, requiring defendant officials of the California Department of Corrections to produce documents similar or identical to the documents at issue in the instant case. In addition, plaintiffs wish to inform the Court that on May 1, 1974, the California Supreme Court denied a petition for hearing in the case of *In re Olson* (see defendants' request for review at 8).



4. *Defendants Have Failed to Produce Documents as to Which Voluntary Production was Offered*

As may be seen from the annexed affidavit of B. E. Bergesen, III, co-counsel for plaintiffs herein, defendants have failed to produce even those documents which they have voluntarily offered to produce, and have failed to submit a detailed list of those documents which they have withheld from plaintiffs' counsel. At page 32 of defendants' response to plaintiffs' motion to compel production of documents, dated March 25, 1974, defendants state that "[s]ince plaintiffs have shown that the memoranda may lead to admissible evidence defendants will, if a copy is still in their custody or control, make it available to them." Although this statement was made on March 25, 1974, and although plaintiffs' counsel informed defendants' counsel on April 29, 1974, that the documents still had not been received, defendants have to this day not made that document available to plaintiffs, nor have they stated in writing that it is not available.

More importantly, defendants have withheld from plaintiffs material from the named plaintiffs' central files which even they have, in the past, promised to produce. For example, at page 25 of defendants' response to plaintiffs' motion to compel production of documents, they said that:

> "Plaintiffs were informed that those portions of their files which the Department of Corrections had waived their privilege against disclosing will be made available for inspection in San Francisco. In addition, they have been further advised that since the filing of their objections in this

case the Department of Corrections has adopted a broader policy of waiver. Hence, all portions of plaintiffs' files, except those which would endanger institutional or staff security, pose a danger to the safety of another person or significantly impair the rehabilitation or adjustment of plaintiffs if communicated to them, will be made available."

Nevertheless, when, four days later, plaintiffs' counsel inspected plaintiffs' central files at the offices of the Department of Corrections in San Francisco, they were not shown (and have not been shown to this date) the central files for three named plaintiffs, nor were they provided with a list of those documents which had been removed prior to making the files available. As may be seen from Exhibits A and B to the annexed affidavit of B. E. Bergesen, III, virtually every conceivably relevant document had been taken out of these files prior to their production on March 29, 1974. These documents alone show beyond any doubt that far more documents were taken out than "those which would engander institutional or staff security, pose a danger to the safety of another person or significantly impair the rehabilitation or adjustment of plaintiffs if communicated to them * * *." Surely the performance of defendants in withholding from plaintiffs, from March through June of 1974, those documents which they have promised to voluntarily supply, demonstrates the worthlessness of defendants' offers of voluntary production, and manifests the absolute necessity that a strong order issue from this Court requiring production of these documents.



In summary, it is plaintiffs' submission that defendants have, for the most part, simply ignored the authorities and arguments set forth in plaintiffs' lengthy memoranda of points and authorities in support of their motion for an order compelling discovery under Rule 37, which the Magistrate has recommended be granted. In their latest submission, they add nothing new, and it is therefore urged that the findings and recommendations of Magistrate Urdan be adopted by this Court, and that defendants be required, forthwith, to answer the interrogatories and to produce the documents.

Dated: June 3, 1974.

B. E. Bergesen, III
Fay Stender
Sidney M. Wolinsky
/s/ B. E. Bergesen, III
B. E. Bergesen, III

[Exhibits A, B, C, D Omitted in Printing This Appendix]

[Caption Omitted in Printing]

AFFIDAVIT OF B. E. BERGESEN, III, IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' REQUEST FOR REVIEW OF MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

I, B. E. BERGESEN, III, being duly sworn, depose and say:

1. I am an attorney admitted to practice before the bar of this Court, and am one of the attorneys for plaintiffs in the above-captioned action.

2. On or about March 22, 1974, I had a telephone conversation with William D. Stein, Esq., one of the counsel for defendants herein. The subject of the conversation was the inspection of plaintiffs' central files pursuant to Rule 34 in the instant case, which was to be conducted by plaintiffs' counsel on March 29, 1974. During this conversation, I informed Mr. Stein that plaintiffs' counsel believed it to be absolutely essential that, at the time said files were inspected, plaintiffs' counsel receive a list designating, with respect to each file, each document which had been withheld from plaintiffs' counsel upon the ground of privilege, together with an indication of the basis for the claim of privilege. This conversation was memorialized in a confirming letter from me to Mr. Stein under date of March 22, 1974.

3. During the morning of March 29, 1974, this affiant and his co-counsel, Fay Stender, Esq., went to the offices of the Department of Corrections in the Ferry Building in San Francisco to inspect the central files of the named plaintiffs herein. However, no



files were produced for plaintiffs van Geldern, Jones and Chatfield. According to defendants' counsel, the Jones file was not produced because Jones was then a defendant in a pending criminal prosecution. No explanation was offered for the failure to produce the files of van Geldern and Chatfield.

4. Also during the inspection of March 29, 1974, plaintiffs' counsel were provided with a form document signed by a Records Officer listing various types of documents which had been removed from the central file which we were inspecting because it had been "classified as confidential within the State Department of Corrections * * *." Copies of such forms for plaintiffs Lewis and Gardner are attached hereto as Exhibits A and B to this affidavit. These documents show that a considerable quantity of highly relevant material was removed from these files prior to our inspection.

5. Also during said inspection on March 29, 1974, plaintiffs' counsel requested, of the official on duty who was making available the records to us, that we be furnished with a list setting forth each and every document which had been removed from these files. The official said that she had no such list which she could give us. Thereafter, attorney Stein, during the hearing on April 1, 1974, stated, to the best of this affiant's recollection, that such an itemized list would be furnished to counsel for plaintiffs.

6. As of the date of this affidavit, plaintiffs' counsel have still not been furnished with (i) the three central files which were not furnished them on March

29, 1974, and (ii) an itemized list of the documents which had been removed, as confidential, from those files which they did inspect on that date.

7. On or about April 29, 1974, I spoke by telephone with William D. Stein, Esq., during which conversation he agreed to send me a copy of the so-called Doran memorandum (item 6 of plaintiffs' request for production of documents) if it was in existence or else advise me in writing that it is not in existence. To date, I have received neither the document nor any written advice that it does not exist.

/s/ B. E. Bergesen, III
B. E. Bergesen, III

[Jurat Omitted in Printing]



[Exhibit A]

**Name LEWIS, BILL** **Number A-72970**

**The following material, itemized below, classified as confidential within the State Department of Corrections, has been removed from the Central File of the above named inmate. The material has been placed in a separate folder which is available in the Records Office for review by Department of Corrections Personnel and/or agencies authorized to see confidential data as provided for in current statutes and Department of Corrections Manuals of Operating Procedure.**

- ☒ Incident Reports
- ☒ Report of Violation of Institution Rules—CDC 115
- ☒ General Correspondence
- ☒ Statements of Judge, Law-enforcement Agency, & District Attorney per Secs. 1203.01, 3022, 3042 PC involving inmate with Statutory Life sentence
- ☒ Summary of Statements and/or Recommendation Received Pursuant to 3022, 3042-3046 PC—CDC 274
- ☒ Chrono-Custody or General (White) CDC 128A
- ☒ Chrono-Classification and Social Service (Canary)—CDC 128B
- ☒ Chrono-Classification Committee (Orange)—CDC 128G
- ☒ Report of Arresting Officer CDC 199A
- ☒ Report of Jailer CDC 199B
- ☐ Report of Transporting Officer CDC 199C
- ☒ Source of Information CDC 198A
- ☒ Evaluation at Time of Adult Authority Hearing CDC 279
- ☒ Cumulative Case Summary
- ☒ Cumulative Case Summary of Crime Partners
- ☒ Cumulative Case Summaries on Old Commitments
- ☒ CII Transcript (Rap Sheets)
- ☒ Request to Former Employer CDC 203
- ☒ Questionnaire—Spouse—CDC 204A
- ☒ Questionnaire—Parent—CDC 205A
- ☒ Questionnaire—Friend—CDC 207A
- ☒ Confidential Correspondence from Family and Friends
- ☒ Adult Authority Request for Investigation and/or Program Development—CDC 247
- ☒ Adult Authority and Parole Referral Report

**Date 3-21-74**

/s/ [Records Officer]
**Records Officer**

[Exhibit B]

Name GARDNER, ROBERT Number A-28381

The following material, itemized below, classified as confidential within the State Department of Corrections, has been removed from the Central File of the above named inmate. The material has been placed in a separate folder which is available in the Records Office for review by Department of Corrections Personnel and/or agencies authorized to see confidential data as provided for in current statutes and Department of Corrections Manuals of Operating Procedure.

- ☒ Incident Reports
- ☒ Report of Violation of Institution Rules—CDC 115
- ☒ General Correspondence
- ☒ Statements of Judge, Law-enforcement Agency, & District Attorney per Secs. 1203.01, 3022, 3042 PC involving inmate with Statutory Life sentence
- ☒ Summary of Statements and/or Recommendation Received Pursuant to 3022, 3042-3046 PC—CDC 274
- ☒ Chrono-Custody or General (White) CDC 128A
- ☒ Chrono-Classification and Social Service (Canary)—CDC 128B
- ☒ Chrono-Classification Committee (Orange)—CDC 128G
- ☒ Report of Arresting Officer CDC 199A
- ☒ Report of Jailer CDC 199B
- ☒ Report of Transporting Officer CDC 199C
- ☒ Source of Information CDC 198A
- ☒ Evaluation at Time of Adult Authority Hearing CDC 279
- ☒ Cumulative Case Summary
- ☒ Cumulative Case Summary of Crime Partners
- ☒ Cumulative Case Summaries on Old Commitments
- ☒ CII Transcript (Rap Sheets)
- ☒ Request to Former Employer CDC 203
- ☒ Questionnaire—Spouse—CDC 204A
- ☒ Questionnaire—Parent—CDC 205A
- ☒ Questionnaire—Friend—CDC 207A
- ☒ Confidential Correspondence from Family and Friends
- ☒ Adult Authority Request for Investigation and/or Program Development—CDC 247
- ☒ Adult Authority and Parole Referral Report

Date 3-21-74

/s/ [Records Officer]
Records Officer

[Certificate of Service Omitted in Printing]



United States District Court
Northern District of California

[Filed June 11, 1974]

[Caption Omitted in Printing]

FINDING AND RECOMMENDATIONS

[The Magistrate's Findings and Recommendations filed June 11, 1974, are omitted from the printing of the appendix, and are found in the printed Petition for Writ of Certiorari, Appendix, pages xxxiv-xlii.]

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United States District Court
Northern District of California

[Filed Jun. 17, 1974]

[Caption Omitted in Printing]

NOTICE OF INTENT TO SEEK REVIEW OF MAGISTRATE'S DECISION AND STATEMENT OF OBJECTIONS

To: The Honorable David R. Urdan, United States Magistrate, Room 18201, 450 Golden Gate Avenue, San Francisco, California 94102; and B. E. Bergesen, III, 795 Turk Street, San Francisco, California 94102; and Sidney M. Wolinsky, 433 Turk Street, San Francisco, California 94102; counsel for plaintiffs:

PLEASE TAKE NOTICE that, pursuant to Magistrate's Rule 505(4) the defendants intend to seek review of the Magistrate's Findings and Recommendations of June 11, 1974, in the above-entitled matter.

*Statement of Objections*

Defendants object to the Magistrate's Findings and Recommendations in the following particulars:

I

The Magistrate's Findings and Recommendations compel the defendants to permit attorneys who attend Adult Authority hearings to take hand-written notes in contravention of the prohibition set forth in Adult Authority Policy Statement No. 3, a policy statement of state-wide application formally adopted by the Adult Authority sitting en banc in April, 1967. It is defendants' position that this prohibition in Policy Statement No. 3 is a valid administrative rule of state-wide application within the meaning of Title 28, United States Code sections 2281 and 2284, and which the defendants are entitled to follow absent an order to the contrary by a three-judge district court.

II

The Magistrate's Findings and Recommendations improperly order defendants to grant counsel for plaintiffs access to the files of two hundred inmates of California state prisons who are not parties to this litigation. This part of the Findings and Recommendations would, therefore, compel defendants to produce documents that which are irrelevant, confidential, and privileged.



III

The Magistrate's Findings and Recommendations were served by mail on counsel for defendants. It is defendants' intention to file detailed written objections, with supporting points and authorities with this Court on or before June 24, 1974, as provided in Local Rule 121(e).

Dated: June 17, 1974

Evelle J. Younger
Attorney General
Jack R. Winkler
Chief Assistant
Attorney General—Criminal Division
Edward P. O'Brien
Assistant Attorney General
W. Erie Collins
Deputy Attorney General

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General

Attorneys for Defendants

[Declaration of Service Omitted in Printing]

United States District Court
Northern District of California

[Filed June 20, 1974]

[Caption Omitted in Printing]

ORDER

[The District Court's Discovery Order filed June 20, 1974 is omitted in the printing of this appendix, and is found in the printed Petition For Writ of Certiorari, Appendix, pages xv-xvii.]

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United States District Court
for the Northern District of California

[Filed June 24, 1974]

[Caption Omitted in Printing]

NOTICE OF PLAINTIFFS' REQUEST FOR REVIEW OF MAGISTRATE'S DECISION AND STATEMENT OF OBJECTIONS

To: The Honorable David R. Urdan, United States Magistrate, Room 18201, 450 Golden Gate Avenue, San Francisco, California, 94102, and Karl S. Mayer, Office of the Attorney General, 6000 State Building, 350 McAllister Street, San Francisco, California 94102, counsel for defendants.

PLEASE TAKE NOTICE that plaintiffs hereby seek review of the Magistrate's Findings and Recommendations of June 11, 1974, in the above entitled matter.



*Statement of Objections*

Plaintiffs object to the Magistrate's Findings and Recommendations in the following particulars:

I

The Magistrate's denial of plaintiffs' motion to have Adult Authority proceedings tape recorded is without basis in either law or in fact. The Magistrate's factual finding that the "mechanics of tape recording and the intrusion of such system" upon the need for preserving the unfettered conduct of the hearings is without any factual foundation, since all that would be required would be the flicking of a switch on and off to tape record proceedings. Moreover, over 20 states in the United States already tape-record proceedings, a fact that defendants do not deny. The Magistrate's further finding that attendance at hearings "is a fair substitute for recording" is without factual foundation. To the contrary, it is apparent that a verbatim record of hundreds of hearings held in the normal course would prove much more valuable to plaintiffs and to this Court than would the rough notes gathered from a few carefully selected hearings during which the two panel members would be quite aware of the presence of actual witnesses.

II

Restriction of examination and inspection of inmate files to attorneys alone, rather than allowing inspection by certified law students under the direct supervision of plaintiffs' counsel, has no basis in fact or in

law; is supported by no evidentiary reason; runs counter to the spirit of recent decisions recognizing the importance of law student assistance; and would make it impossible for plaintiffs' attorneys to effectively undertake discovery.

III

The Magistrate's restriction of the number of files to 200 is arbitrary and is unsupported by any fact or evidence in the record.

IV

The Magistrate's finding that plaintiffs are not entitled to attorneys' fees on the grounds that the requests are "unique" is without legal or factual basis. The failure of the defendants to permit observers at their hearings (when they routinely have allowed district attorneys, judges, members of the press, and other "interested parties"), their refusal to allow any transcript or recording, and their refusal to allow any inspection whatsoever of any central files except the named plaintiffs' was without substantial justification.

V

In addition to the foregoing objections to the Magistrate's findings, plaintiffs respectfully submit that clarification is required so that the court order should indicate that the files to be produced should be files which are either designated by plaintiffs' counsel or are randomly selected by plaintiffs' counsel.



VI

Regardless of the Court's ruling upon the question of attorneys' fees in the matter before the Magistrate, defendants' present objections to the Magistrate's current ruling are without substantial justification. Plaintiffs therefore seek reasonable attorneys' fees for this matter now being heard before the Honorable Stanley A. Weigel.

Dated: June 21, 1974.

B. E. Bergesen, III
Fay Stender
Sidney M. Wolinsky
/s/ B. E. Bergesen, III
Attorneys for Plaintiffs

United States District Court
for the Northern District of California

[Filed June 24, 1974]

[Caption Omitted in Printing]

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' REQUEST FOR REVIEW OF MAGISTRATE'S DECISION

*Introduction*

In their discovery motion before Magistrate Urdan, plaintiffs sought an order which would require (1) that members of the California Bar be allowed to attend Adult Authority parole hearings; (2) that defendants allow, at plaintiffs' expense, tape recording of Adult Authority parole hearings; (3) that plaintiffs be permitted to inspect at random every 20th central file of California prison inmates, and (4) that defendants pay to plaintiffs the cost reasonably incurred in obtaining said order. In essence, the Magistrate granted the first request, but limited the number of hearings and the circumstances of attendance at such hearings; he denied outright the second request for tape recording; and granted plaintiffs' motion to inspect central files, but limited them to 200 files and restricted examination to attorneys for plaintiffs. Plaintiffs object to (i) the refusal to permit tape recordings of hearings between now and the time of trial, (ii) the restriction of files to 200 such files, and (iii) the denial of attorneys' fees for the motion.

Furthermore, in order to avoid further disputes or delays in the matter, plaintiffs respectfully suggest



that two modifications of the Magistrate's recommendation would be in order for the purpose of clarification. *First,* the Magistrate restricted inspection of the files to "attorneys for plaintiffs". We do not know whether this was deliberate on the part of the Magistrate or whether by inadvertence he cmitted reference to law students working for attorneys for plaintiffs or other personnel. In any event, we believe it would be appropriate and, indeed, necessary to effective discovery for the order specifically to permit certified law students in the employ of plaintiffs' attorneys to participate in inspection of the files, especially in light of the volume involved. *Second,* it is absolutely essential that the files to be inspected by plaintiffs' counsel be selected at random, and that the order clearly state that the files to be produced should be those either designated by plaintiffs or randomly selected by plaintiffs' counsel.

I

Tape recording of proceedings is a valid and appropriate discovery device which would develop important evidence on the central issue of this litigation with minimal intrusion on the Adult Authority's meetings. In connection with the hearing before the Magistrate, plaintiffs submitted a memorandum of points and Authorities dated May 15, 1974, which briefed the issues now before this Court. We will not repeat the material contained in that brief, but would simply refer the Court's attention to the list of the issues contained in the complaint, discussed at page 3 of that Memorandum of Points and Authorities, and

the relevant cases discussed at pages 4-6 of that memorandum.

Of course, the starting point for this Court's determination is the statement made at page 2 of the Magistrate's Recommendations:

> "Since the plaintiffs allege that the proceedings of the Adult Authority leading to a determination as to whether inmates in the California Prison System are to be confined or released do not meet due process requirements, it is critical to aid the Court in making a determination as to the constitutionality of the procedures that the plaintiffs be permitted to develop facts and information through the Federal Rules discovery process, as to what transpires at such a hearing, . . . and also to examine the central files of inmates other than the named plaintiffs."

It would be hard to imagine a procedure which would be *more* calculated to "develop facts and information" as to "what transpires at such a hearing" than actually tape recording the proceedings. Moreover, plaintiffs have offered to supply the tape recorders and tapes, and would even be willing to supply personnel to run the tape recorders. Accordingly, there is no burden whatsoever on the defendants for this discovery procedure. The necessity for this material is especially evident in light of the Magistrate's further findings that "the defendants completely control access to Adult Authority hearings that are the subject matter of this litigation" and his further finding that "the procedure followed at these hearings is relevant and material to the subject matter of this case."



Thus the Magistrate seemed to base his denial of the right to tape record on the grounds that attendance at hearings "is a fair substitute for recording" (Magistrate's Findings p. 5). We respectfully submit that such a finding has no factual basis. Selective attendance at hearings—during which one can only attempt to take down a few notes and perhaps remember what occurred and then transmit such observations secondhand to attorneys or to the Court—is not nearly as precise or as substantial evidence as is a direct tape recording. Only with a tape recording can there be no dispute as to precisely what occurred. Only with tape recordings can the argument and presentation of evidence that parties are being selective in portions they choose be effectively answered. Only with a tape recording can there be an entirely accurate picture over a reasonable period of time presented to this Court as to whether or not the procedures followed by defendants meet constitutional standards. And only the tape recording of numerous hearings over a protracted period of time can overcome the natural inclination of panel members to act in a special manner —designed to impress the Court—during those few hearings in which they know observers are present.

Further, there is no legal authority for the proposition that because plaintiffs can get at part of the information crucial to the central issue of the lawsuit, they should therefore be denied access to all of the information. As the Magistrate correctly observed: "Federal Courts have allowed discovery by means of observation and have ordered the production of tape

recordings and transcripts in certain cases" (Magistrate's Recommendations p. 3). Since over 20 states in the United States already tape record proceedings, since reporters are already allowed access to Adult Authority proceedings, and since plaintiffs have offered to bear any financial or administrative burden in operating the tape recordings, we respectfully submit that the Magistrate should have permitted such recording.

## II

The order should be clarified in order to permit plaintiffs to be assisted by such of their law students as have been certified under applicable California Bar procedures. The United States Supreme Court has already held, in the context of prison litigation, that assistance of law students to attorneys is often crucial to the successful prosecution of litigation. ***Martinez v. Procunier,*** 346 F.Supp. 1092 (N.D. Cal. 1973) *aff'd* ..... U.S. ..... (April 29, 1974). The law students here in question are high-ranking students at Boalt and Hastings Law Schools, operating under direct attorney supervision and subject to the sanctions of the Bar, the Courts, and the Deans of their respective law schools. Plaintiffs would have no objection to designating such law students in advance and to limiting the number of law students to three, but believe that—in order to avoid future conflict between the parties—the order should specifically state that such students are permitted to examine the files.



## III

With respect to the files themselves, plaintiffs submit that 200 files—representing approximately one percent of all California prisoners—provides an inadequate sample. Obviously, the more files that are examined, the more relevant evidence will be produced. Since 200 files are already going to be produced, the only possible objection to producing the 800 additional files sought by plaintiffs is based upon the time and expense occasioned by plaintiffs' inspection. Plaintiffs, however, would conduct the entire inspection, and would also bear the cost of whatever copying is done; defendants' efforts would be limited to simply producing the files at a designated place, which could be the very institutions where the files are being maintained. Where the information contained in the files is so crucial to proving or disproving plaintiffs' case; *where defendants already have complete access to the files of all California inmates;* and where the burden upon defendants is so minimal, plaintiffs shall be permitted to inspect every 20th file, as requested.

In any event, it is absolutely essential that the files which plaintiffs are allowed to inspect not be carefully hand picked by defendants. It is undeniable that it would be easy to select 200 (or even 1,000) files which would contain virtually no documents of any relevance whatsoever to the case at bar. (Indeed, it would be easy to select 200 files of inmates who have never even *appeared* before the Adult Authority!) Consequently, it is essential that plaintiffs' counsel be

able to select those files which they have reason to believe contain relevant evidence. At the very least, the files to be inspected must be selected in a way that guarantees a random sampling.

*Conclusion*

For all of the foregoing reasons, this Court should review and modify the Magistrate's Findings and Recommendations of June 11, 1974, in accordance with the proposed order annexed hereto and filed and served herewith.

Dated: June 21, 1974.

B. E. Bergesen, III
Fay Stender
Sidney M. Wolinsky
/s/ B. E. Bergesen, III
Attorneys for Plaintiffs

[Proposed Order Omitted in Printing]

[Certificate of Service Omitted in Printing]



United States District Court
for the Northern District of California

[Filed June 24, 1974]

[Caption Omitted in Printing]

REQUEST FOR REVIEW OF MAGISTRATE'S FINDINGS AND RECOMMENDATIONS

*Preliminary Statement*

In a document entitled, "Motion to Compel Discovery" plaintiffs requested that:

(1) Any members in good standing of the California Bar be allowed to attend in groups of three any Adult Authority sentence fixing or parole granting hearing conducted between now and the time trial commences in this action;

(2) The Adult Authority be ordered to tape-record all sentence fixing or parole granting hearings conducted between now and the time trial commences in this action;

(3) Counsel for plaintiffs be permitted to inspect at random every 20th file of inmates confined in the California prison system (this would be about 1,100 files).

Defendants filed a response and the matter was argued before Magistrate Urdan on June 5, 1974. On June 11, 1974, the Magistrate filed and served his Findings and Recommendations, a copy of which is attached hereto as Exhibit A.

The Magistrate recommends: (1) that members of the California Bar be allowed to attend and take notes

at a minimum of fifteen Adult Authority hearings before August 15, 1974, and that plaintiffs' counsel be included with respect to at least one-half of the visits so scheduled; (2) that plaintiffs request for tape-recordings for all Adult Authority hearings until the time of commencement of trial should be denied; (3) that plaintiffs request to examine inmate files other than the files of the named plaintiffs which have already been provided be granted but modified to include only a total of 200 files. With respect to examination of non-party inmate files, the Magistrate recommends that a protective order issue which would restrict examination and inspection of the files to attorneys for plaintiffs and for their use only in connection with this lawsuit.

On June 17, 1974, pursuant to Magistrate's Rule 505(4), defendants filed and served their Notice of Intent to Seek Review of Magistrate's Decision and Statement of Objections. A copy of this notice is attached hereto as Exhibit B. Defendants' notice states an intent to request review of the Magistrate's Findings and Recommendations insofar as they would permit attorneys to take notes during their attendance at Adult Authority hearings and insofar as they recommend disclosure of non-party inmate files. Since the filing of that notice, counsel for plaintiffs has been in touch with the California Adult Authority who agree that the attorneys who attend the hearings may take notes. Accordingly, defendants no longer seek review of this aspect of the Magistrate's Findings and Recommendations.



Defendants do, however, request review of the Magistrate's Recommendations that the files of 200 inmates, who are not parties to this litigation, be disclosed for inspection by counsel for plaintiffs.

*Argument*

I

Plaintiffs' Demand for Access to the Files of Numerous Inmates Who Are Not Parties Is Without Foundation. Would Breach Recognized Confidentiality, and Must Be Denied.

Plaintiffs' final demand in the motion to compel is that counsel be provided access to every 20th file of inmates in the California correctional system. The Magistrate recommends this be granted up to a total of 200 files. The files of the seven-named plaintiffs are available for their inspection. The provision of these files for these purposes is consistent with the scope of the opinions, relied on in plaintiffs' motion to compel, in *In re Prewitt,* 8 Cal.3d 470 (1972); and in *Olson v. Pope,* 37 Cal.App.3d 783 (1974).

However, plaintiffs' demands to inspect indiscriminately the files of numerous other inmates, is totally without foundation and, indeed, lacks even any expression of legitimate interest in plaintiffs' moving papers.

Plaintiffs' demand to inspect at random the files of numerous other inmates incarcerated in California's prison system is necessarily based on the premise that they have a right to access to any such file. There is nothing in any of the cases cited in plaintiffs' points

and authorities (Plain's P. & A., p. 5), including cites to *In re Prewitt, supra,* and *Olson v. Pope, supra,* that would support any such right. It is one thing for an inmate to discover the contents of his own file insofar as they relate to a proceeding in which he is a party. Such discovery is permitted in California under *Olson v. Pope, supra,* 37 Cal.App.3d 783, and under *In re Prewitt, supra,* 8 Cal.3d 470 (1972). However, it is quite another thing for an inmate or his counsel to have access to examine the contents of files of other inmates.

There are valid reasons for defendants' objections to plaintiffs' demands for random access to the files of other inmates. Defendants have a valid interest in protecting individuals, including informants inside and outside of prison, and in insuring institutional security. See, *Morrissey v. Brewer,* 408 U.S. 471, 487 (1972); *McCray v. Illinois,* 386 U.S. 300, 308-309 (1967); *In re Olson, supra,* 37 Cal.App.3d at 788. Defendants also have a valid interest in preserving confidentiality of inmates' central files for the purpose of encouraging candor and complete disclosure of information concerning inmates from both public officials and private citizens. See, Cal. Evid. Code §1040; *In re Olson, supra,* 37 Cal.App.3d at 783.

Similarly, defendants have a valid interest in preserving confidentiality as required by California statutes, e.g., the confidentiality of statements and recommendations submitted by judges, district attorneys and sheriffs under California Penal Code sections 3046 and 1203.01, statements from other parties



in response to notices given under California Penal Code sections 3022 and 3042, and statutory limitations respecting the inspection of criminal records under California Penal Code sections 11105(b), 11120, and 11122-11125.

The confidentiality of the contents of prisoners' files from disclosure to other prisoners or their counsel is well recognized. Indeed, a district court order granting such disclosure, not through inspection but only through answers to interrogatories served on the federal parole board, was vacated as clearly erroneous on mandamus proceedings in the Court of Appeals. *United States Board of Parole v. Merhige,* 487 F.2d 25, 28-30 (4th Cir. 1973). Plaintiffs' demand for actual access to the files would have the court go beyond even the clearly erroneous disclosure order vacated in *Merhige.*

In *In re Prewitt, supra,* and in *Olson v. Pope, supra,* the California courts required disclosure after balancing the interests of a particular inmate in access to his records for particular purposes against the interests of the Department of Corrections and the Adult Authority in preserving confidentiality. Similarly, in the instant action the named plaintiffs have an interest in discovering from *their* files the information which may have been relied on by authorities in making decisions affecting those seven inmates. However, the instant action expresses no valid interest of inmates who are not plaintiffs and expresses no basis for granting to these plaintiffs access to other inmates' files.

An inmate's file contains information the disclosure of which would constitute as much an invasion of privacy as would the disclosure information typically contained in personnel files. Both federal law, Title 5, United States Code section 552(b)(6); cf, *Cowles Communications, Inc. v. Department of Justice,* 325 F.Supp. 726 (N.D. Cal. 1971); *Sterling Drug, Inc. v. FTC,* 450 F.2d 698 (D.C. Cir. 1971); *Soucie v. David,* 448 F.2d 1067, 1076 (D.C. Cir. 1971), and California law, California Evidence Code section 1040; California Government Code sections 6250-6260; cf. *Procunier v. Superior Court,* 35 Cal.App.3d 207, 110 Cal.Rptr. 529 (1973), recognize a privilege, or at least a qualified privilege, respecting the inspection of personnel records insofar as this would involve an unwarranted invasion of privacy. Thus, even if there is no absolute privilege under state or federal law, there is a qualified privilege such that disclosure should be ordered only in cases of compelling need and then only after an *in camera* hearing to determine whether requirements of public interest are such as to outweigh governmental interests and interests in privacy. See, *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 783, 788, 792 (D.C. Cir. 1971); *Pleasant Hill Bank v. United States,* 58 F.R.D. 97 (W.D. Mo. 1973); *Bredice v. Doctors Hospital, Inc.,* 50 F.R.D. 249 (1970); *Walker v. Liberty Mutual Company,* 48 F.R.D. 365 (D.D. Wis. 1970).

Plaintiffs have been allowed access to *their* central files. We urgently request that plaintiffs' demand for access to the files of other inmates, not parties to this



action, be denied or at least denied pending an *in camera* review of the files sought to be examined. It would be an unconscionable invasion of privacy and of valid governmental interests to grant full access to these inmate files without any knowledgeable balancing by the court of the competing interests involved.

*Conclusion*

For all of the above reasons, defendants respectfully submit that plaintiffs' motion to compel disclosure of the files of inmates who are not parties to this action should be denied and that the Magistrate's Recommendation to this effect should be disapproved.

Attached hereto is a proposed order for signature by the United States District Judge.

Dated: June 24, 1974

Evelle J. Younger, Attorney General
of the State of California
Jack R. Winkler, Chief Assistant
Attorney General—Criminal Division
Edward P. O'Brien
Assistant Attorney General
/s/ John T. Murphy
John T. Murphy
Deputy Attorney General
Karl S. Mayer
Deputy Attorney General
Attorneys for Defendants

KSM:pm

[Declaration of Service Omitted in Printing]

In the United States District Court
for the Northern District of California

[Caption Omitted in Printing]

[Filed June 26, 1974]

AMENDMENT OF PLEADING

Pursuant to leave granted by order of this court on June 21, 1974, plaintiffs file herein the following amendment to their complaint.

A. Amending paragraph 1 to read as follows:

1. This is a civil action brought by plaintiffs on behalf of themselves and all others similarly situated under Section 1343 of Title 28 of the United States Code, to redress the deprivation of rights, privileges and immunities secured to them by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States and Article I, Sections 6, 8, and 13 of the California Constitution. The jurisdiction of this court for the State Causes of Action is invoked under the doctrine of pendant jurisdiction inasmuch as the State Causes of Action arise out of the same facts and circumstances as the Federal Causes of Action and similar questions of law and fact are involved. Pursuant to 42 U.S.C. Sections 1983 and 1988 and 28 U.S.C. Sections 2201 and 2202, plaintiffs seek declaratory and injunctive relief to remedy the unconstitutional conduct of defendants complained of herein.

B. Amending paragraph 2.a. to read as follows:

2.a. Plaintiffs and their classes are inmates in various California state prisons. They challenge



the hearing procedures whereby defendants, members of the California Adult Authority and the Department of Corrections, grant, deny, or rescind parole, fix and refix sentences, and whereby they purport to adjudicate infractions of prison rules. Because these decisions involve fundamental rights of liberty and result in grievous loss for thousands of California prisoners by depriving them of that liberty, the process of making these decisions must meet the due process requirements of the Fourteenth Amendment of the United States Constitution and Article I, Sections 8 and 13 of the California Constitution.

C. Amending paragraph 17 to read as follows:

17. While acting under color of the law of the State of California, as more fully described in paragraphs 8 through 16 thereof, defendants have deprived plaintiffs and their subclasses of the following rights which are secured to them by the United States Constitution and the California Constitution:

a. The right not to have a decision by the Adult Authority, which fixes an inmate's term and sets a date for his release on parole, rescinded in the absence of (a) good cause therefor, and (b) fundamental procedural safeguards, secured by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 13 of the California Constitution.

b. The right not to have their parole revoked in the absence of (a) good cause therefor, and (b) fundamental procedural safeguards, secured by the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 13 of the California Constitution.

c. The right not to have term-fixing and parole release decisions made in the absence of counsel and other fundamental procedural safeguards, secured by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 8, 11, 13, and 21 of the California Constitution.

d. The right not to have disciplinary sanctions imposed for alleged violation of prison rules, or reports of said violations placed in inmate central files in the absence of a fair and impartial investigation of the facts, a hearing before an impartial tribunal whenever serious disciplinary sanctions are considered, the right to counsel whenever serious sanctions are considered, and the right to view and examine the inmate's central file, all of which rights are secured by the Fifth and Sixth Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Sections 8 and 13 or the California Constitution.

e. The right to be free from prolonged incarceration and isolation in the absence of any



of the procedural safeguards enumerated above under conditions which shock the general conscience and are intolerable to fundamental fairness, which constitute punishment greatly disproportionate to any offense for which they are imposed and which go beyond what is necessary to accomplish any legitimate penal aim, all secured to plaintiffs and their class under the Eighth Amendment to the United States Constitution and Article I, Section 6 of the California Constitution.

D. Amending paragraph 1 of the relief requested to read as follows:

1. Issue a declaratory judgment that the acts of defendants enumerated in paragraphs 2, 8, 9, 10, 11, 12, 13, 14, 15 and 16 of this complaint with respect to the revocation, rescission, or suspension of parole; the refixing or fixing of sentences; or the imposition of sanctions for alleged rules infractions contravene the rights of plaintiffs and their class under the Fifth, Sixth, and Eighth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution and Article I, Sections 6, 8, 11, 13, and 21 of the California Constitution.

Dated: June 25, 1974

/s/ Sidney M. Wolinsky
Sidney M. Wolinsky
Attorney for Plaintiffs

[Statement of Service Omitted in Printing]

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United States Court of Appeals
for the Ninth Circuit

[Filed June 26, 1974]

No. 74-2206

Henry W. Kerr, et al,
Petitioners,

vs.

The Honorable Stanley A. Weigel,
Respondent,

John Van Geldern, et al,
Real Parties in Interest.

## Petition for Writ of Mandamus and/or Prohibition and Application for Stay of Part of Order

Petitioners,[1] defendants in a civil rights action, apply for a writ of mandamus and/or prohibition and for a stay of part of an order of the district court, and in support of their application state:

[1]Petitioners are Henry W. Kerr, Curtis O. Lynum, Walter A. Gordon, Jr., Manley J. Bowler, James H. Hoover, Charles E. Brown and Daniel R. Lopez, sued as members of the California Adult Authority; Joseph A. Spangler, Administrative Officer of the state agency; and Raymond K. Procunier, Director of the California Department of Corrections.



### Jurisdiction

The jurisdiction of this Court is founded on Title 28, United States Code section 1651(a).

### Questions Presented

1. Whether the district court clearly erred in ordering the production of the personnel files of the petitioners for inspection and copying by plaintiffs?

2. Whether the district court clearly erred in ordering the production for inspection and copying by plaintiffs the personnel files of Adult Authority hearing representatives, persons not parties in the action?

3. Whether the district court clearly erred in granting access for inspection and copying by plaintiffs of the above personnel files without, at the very least, an *in camera* review to determine the relevance of the documents to the presentation of plaintiffs' case and to balance against plaintiffs' possible interests, the interests of the petitioners and of the non-party hearing representatives in not providing such confidential, privileged and private information?

4. Whether the district court clearly erred in requiring petitioners to produce preliminary drafts, notes, inter-agency or intra-agency memoranda and investigative reports without consideration of the privileges involved in such disclosures?

### Relief Sought

Petitioners, defendants below, ask this Court to direct the district court to (1) vacate its order granting plaintiffs' access to the personnel files of the mem-

bers of the California Adult Authority, the Chief Administrative Officer, and of the Adult Authority hearing representatives, or (2) in the alternative to conduct an *in-camera* review to determine in advance of any disclosure of the files to plaintiffs the relevance of each document in the files to the action and to weigh the need for disclosure to plaintiffs against the public interest and the interest of the persons whose files are to be examined in maintaining their confidentiality. Furthermore, petitioners request that the blanket production of all Adult Authority records, regardless of the privileges involved, be disallowed.

Petitioners also request that the part of the district court's order which requires disclosure of personnel records be stayed pending disposition of this petition.

## Reasons Why the Writ Should Be Issued

The district court clearly erred under Rules 26, 34 and 37, Federal Rules of Civil Procedure, in granting plaintiffs access to personnel files which are confidential, privileged and not relevant to the action.

The district court also clearly erred and abused its discretion in denying defendants' request that such access be preceded by an *in-camera* inspection of the personnel files to determine the relevance of the documents demanded and to balance the recognized interests involved.

The district court erred in granting plaintiffs' unfettered discovery of Adult Authority records without due consideration to the privileged nature of the content of such records.



## Federal Rules, Statutes and Constitutional Provision Involved

This petition involves Rules 26, 34 and 37 of the Federal Rules of Civil Procedure; Title 28, United States Code section 1651; and United States Constitution, Fourth Amendment.

## Statement

Plaintiffs are seven state prisoners and by complaint filed in November, 1972, bring this civil rights action as a class action such that all persons confined in California state prisons or on parole therefrom would be included. However, the district court has not yet ruled that this may be maintained as a class action and plaintiffs have never requested such a ruling. Petitioners and defendants are eight members of the California Adult Authority (the State Parole Board); Joseph Spangler, the Chief Administrative Officer of the Adult Authority; and Raymond K. Procunier, the Director of the California Department of Corrections. A copy of the complaint is attached hereto at Exhibit A.

The complaint demands a declaratory judgment and a mandatory injunction to announce and enforce the following rights at the following proceedings:

(A) *The Rights Demanded:*

1. The right to counsel, appointed if necessary;
2. The right to call favorable witnesses;
3. The right to confront and cross-examine adverse witnesses;

4. The right to discovery of any charges and of the evidence which may be considered with respect to those charges;
5. The right to challenge for bias members of any parole or disciplinary panel;
6. The right to a court reporter and to a transcript of the proceedings for purposes of review; and
7. The right to a written decision including a statement of the reasons for decision and of the evidence relied on.

(B) *The Complaint Demands Each of the Above Rights at Each of the Following Proceedings:*

1. Parole granting proceedings;
2. Sentence fixing proceedings;
3. Parole recision proceedings;
4. Parole revocation proceedings;
5. Sentence re-fixing proceedings;
6. Serious disciplinary proceedings.[2]

[2]Plaintiffs' rights to counsel, favorable witnesses, confrontation, cross-examinations, discovery, and to a written decision giving the reasons for decision and the evidence relied on at parole recision, parole revocation, sentence refixing, and disciplinary proceedings require neither this litigation nor extensive discovery for their establishment or vindication. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Clutchette v. Procunier*, ___ F.2d ___, No. 71-2357 filed April 25, 1974 (9th Cir. 1974) (disciplinary proceedings); *In re Prewitt*, 8 Cal.3d 470, ___ Cal.Rptr. ___ (1972) (parole recision).

Plaintiffs' right to extensive discovery and to written reasons at proceedings on parole granting and sentence fixing is established by California state law, *In re Olson*, 37 Cal.App.3d 783, ___ Cal.Rptr. ___ (1974); *In re Sturm*, ___ Cal.3d ___, ___ Cal.Rptr. ___ (1974),



On June 21, 1973, plaintiffs served a request for documents pursuant to Rule 34, Federal Rules of Civil Procedure. A copy of this request is attached hereto as Exhibit B. Request No. 7 reads as follows:

> "Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs hereby request that defendants, and each of them produce for inspection and copying . . . each of the following documents: . . . 7. All files, including all personnel files, which are maintained by the Adult Authority or by the Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the Executive Officer of the Adult Authority" (Exhibit B, pp. 1, 2-3).

In responding to plaintiffs' request for documents, petitioners declined to furnish the documents demanded in Request No. 7.[3] In March of 1974 plaintiffs moved for an order compelling discovery and included within the motion was a request for an order compelling access to the personnel records. The matter was briefed, argued and submitted before the United States Magistrate and on April 24, 1974, the

and thus require no extensive discovery or litigation for their vindication.

From the above there remains of plaintiffs' demands for relief only the rights to counsel and to call favorable witnesses at parole granting hearings, and their demands for a challenge for bias and a reporter at all listed proceedings. Petitioners urge these few demands do not justify compelled disclosure of their personnel files.

[3]Plaintiffs also served their first set of interrogatories (Exhibit F, herein). Petitioners answered many. Petitioners provided many of the documents demanded and objected to many. The demands and objections were reviewed below resulting in the order herein challenged (Exhibit D). See attached memorandum.

magistrate filed his Findings and Recommendations which included a recommendation that the documents demanded in Item No. 7 be provided. A copy of the magistrate's Findings and Recommendations is attached hereto as Exhibit C. Because these Findings refer to plaintiffs' memorandum it is attached as Exhibit D.

Petitioners timely filed a notice of intent to review the magistrate's Findings and Recommendations and a Request for Review. Responsive documents were filed by plaintiffs and the matter was heard before the Honorable Stanley A. Weigel on June 13, 1974. The matter was submitted before Judge Weigel after argument whereupon the judge overruled defendants' objections to providing these personnel records and ordered that they be provided under a protective order that access need be granted only to counsel for plaintiffs and to two investigators designated by counsel. A copy of Judge Weigel's order is attached hereto as Exhibit E.

The only justifications advanced by plaintiffs for demanding these personnel records are recitations that the federal rules of discovery are to be liberally construed and that the personnel records relate to plaintiffs' allegations in the complaint that the members of the Adult Authority are biased, incompetent and do not represent a cross section of the population of California (Comp., Para. 16, pp. 26-27).[4]

[4]These allegations are not only conclusory, but are alleged on information and belief. No facts within the personal knowledge of plaintiffs support or accompany these allegations, and no basis for their information and belief has ever been advanced by them.



Petitioners have objected to plaintiffs' access to these personnel records upon the grounds that they are irrelevant, confidential, and privileged. Petitioners have also urged that any access by plaintiffs to these personnel files should be preceded by *in-camera* inspection of them for purposes of determining their relevance or the relevance of any of their contents, and also for purposes of balancing against plaintiffs' interests in examining the files, the interests of petitioners and the public interest in non-disclosure. Petitioners' request for *in-camera* review, pointed out that a total of approximately 25 files were involved. Nevertheless, Judge Weigel denied defendants' request for such *in-camera* review (Exhibit D, pp. 2).

Plaintiffs' request for documents Nos. 14, 15, 18, 20, 21, and 22, seek investigative reports, preliminary drafts, notes, inter-agency or intra-agency memorandum to which petitioners assert privilege. Nevertheless the district court adopted the magistrate's Finding and Recommendation that "each and every" such item be produced.

The district court abused its discretion under Rules 26, 34 and 37, Federal Rules of Civil Procedure, in granting access to personnel files, the contents of which are privileged, confidential, and not relevant to the action. In doing so, the district court failed to recognize valid state privileges and confidentialities, and strong public policy supporting them as is required by this Court's decision in ***Baird v. Koerner,*** 279 F.2d 623 (9th Cir. 1960).

The district court also abused its discretion in declining to conduct an *in-camera* inspection to deter-

mine the relevance of the contents of these personnel files and, assuming such relevance, to balance the interests of plaintiffs against the valid interests asserted by petitioners prior to ordering plaintiffs' access to the contents. Inspection of these files under court order, absent such *in-camera* review would be an unreasonable search and seizure in violation of the Fourth Amendment.

The parties and non-parties involved will suffer irreparable injury and an unconscionable and unwarranted invasion of their privacy, not supported by any determination of probable cause to believe the documents are relevant or material, if the writ is not issued and if plaintiffs' counsel are granted access to these personnel records. There is no remedy of immediate appeal, and review by subsequent appeal will clearly be inadequate because the injury complained of will have occurred irreparably.

Furthermore, by permitting plaintiffs to inspect the papers of petitioners, without consideration of privilege, the district court clearly erred.

Mandamus is appropriate to review, in an exceptional case, an interlocutory order which may amount to a clear abuse of discretion, or which may be clearly erroneous, where an appeal is not available. Under the circumstances of this case, it would be appropriate to grant review by mandamus of this aspect of the district court's order for discovery as an exercise of the supervisorial power of this Court over the district courts.



Petitioners have been unable to find a single case, and plaintiffs have cited none, where a federal court has ordered disclosure of personnel files without first conducting an *in-camera* inspection of them. There is certainly no precedent for ordering disclosure by high correctional officials of their personnel files to inmates, or their counsel.

## Argument

### I

### The Personnel Files Demanded by Plaintiffs Are Irrelevant to the Action.

Plaintiffs have requested access to the personnel files of the members of the Adult Authority, of the hearing representatives of the Adult Authority and of the Chief Administrative Officer of the Adult Authority. Their request is Item No. 7 of the plaintiffs' first request for production of documents and reads as follows:

> "Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs hereby request that defendants, and each of them, produce for inspection and copying . . . each of the following documents: . . . . 7. All files, including all personnel files, which are maintained by the Adult Authority or by the Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the Executive Officer of the Adult Authority" (Exhibit B, pp. 1, 2-3).

The defendant members of the California Adult Authority conduct hearings to grant, deny, rescind,

or revoke parole, and to fix or refix sentences. The Adult Authority hearing representatives conduct hearings which lead to recommendations, but not determinations, regarding the same topics. Recommendations of hearing representatives must be endorsed by Adult Authority members. The Chief Administrative Officer of the Adult Authority has not and does not participate in any of the hearings designated in the complaint and has so stated under oath at a deposition conducted by Mr. Wolinsky, counsel for plaintiffs.

The contents of the personnel files of the members of the Adult Authority, of the hearing representatives, and of the Administrative Officer have no relevance to the subject matter of this action. Rights to procedural due process are not, and to our knowledge never have been, dependent upon personal data respecting the officer presiding over the proceeding at which the claimed rights are to be revoked. Any rights to counsel, to call favorable witnesses, or to confront and cross-examine adverse witnesses clearly are not, and should not be a function of such data. The same is true with respect to the claimed rights of a written decision, to a court reporter, and to discovery of the charges and of evidence which may be considered in support of the charges.

Even plaintiffs' claim of a right to challenge for bias is insufficient to support their demands for access to personnel files. Such a challenge is familiar both to the state judiciary, California Code of Civil Procedure sections 170(5), 170.6, and to the federal judi-



ciary, Title 28, United States Code sections 144, 455. However, the right to raise the challenge has never carried with it the right to examine personnel files on the judge to seek evidence in support of the challenge. *A fortiori,* any proceeding to establish or vindicate the right of such a challenge at administrative hearings should not include any right of access to personnel files of the hearing officers to fish for supporting evidence.

Third, to the extent there is some theoretical or speculative interest in determining whether the personnel files demanded contain some evidence which may tend to show bias or incompetence, plaintiffs' demands can well be served, and defendants' interests protected, by the simple expedient of the district court inspecting the files prior to granting plaintiffs' access to their contents. Because only about 25 files are involved, this procedure would cast no unreasonable burden on the district judge, and would not impair plaintiffs' interests, but it would serve to protect the obvious and valid interests of the persons whose files are sought.

In the instant action such *in-camera* review would be especially appropriate since this action sounds in equity and the district judge, sitting without a jury, will determine whether whatever proof is offered by plaintiffs will justify granting plaintiffs' demands for relief, or any of them.

We emphasize that the contents of the personnel files are not the only source of the type of information sought by plaintiffs' demands. Each of the members

of the Adult Authority, and the Chief Administrative Officer, have been deposed by counsel for plaintiffs. At each such deposition a significant amount of biographical data was elicited in response to questions by counsel for plaintiffs apparently to the complete satisfaction of counsel, who after the response went on to other areas of inquiry without being restricted by objections by counsel for the deponent.

Second, the district court has ordered that plaintiffs be provided the following information with respect to each member of the Adult Authority and each hearing representative:

"(A) Date of appointment to Adult Authority;

"(C) Education, names and dates of high school, college, graduate, professional or technical schools and other courses;

"(D) Work experience. please name work title, dates of employment for each position held since high school. Specifically include experiences defending clients against criminal charges; experiences prosecuting criminals; and experiences investigating criminal activity;

"(E) Dates and branch of military service and date and type of discharge;

" (J) Periodicals which you currently subscribe to; . . . " (Plaintiffs First Set of Interrogatories, Exhibit F, herein, Interrogatories Nos. 1 and 2; Magistrate's Findings and Recommendations, Exhibit C, page 3; District Court's Order affirming magistrate, Exhibit E).



Finally, we point out that, despite the district court's sustaining plaintiffs' request for access to the personnel files, the district court sustained defendants' objections to providing the following personal information demanded of each of the members of the Adult Authority and of each Adult Authority hearing representative in Interrogatories Nos. 1 and 2 of plaintiffs' first set of interrogatories (Exhibit E, herein):

"(B) birthplace, birthdate and age;

"(F) all cities of residence since birth;

"(G) the amount of highest and of lowest annual income in past twenty years;

"(H) political party affiliation;

" (I) record of criminal involvement—arrests, convictions;

"(K) years spent unemployed;

"(L) occupations of wife and children; if applicable" (District Court's Order, Exhibit E, p. 2).

For the sake of consistency, the district court should have granted an *in-camera* inspection to at least have stopped disclosure of this type of information from the personnel files.

For all of the above reasons, plaintiffs should not be provided actual access to the personnel files demanded. The district court clearly erred by ordering such access without even an *in-camera* inspection of the contents of the files.

## II

### Disclosure of the Contents of the Personnel Files Should Not Be Ordered Without an In-Camera Inspection to Determine Their Relevancy and to Balance Their Materiality.

The confidentiality of personnel files is well recognized as a general principle both in federal law and in California state law. E.g., Title 5, USC § 552(b)(6); *Soucie v. David,* 448 F.2d 1067, 1078, n. 45 (D. C. Cir. 1971); *Cowles Communications, Inc. v. Department of Justice,* 325 F.Supp. 726, 727 (N.D. Cal. 1971); Cal Gov. Code §§ 6250-6260; *Procunier v. Superior Court,* 35 Cal.App.3d 207, 110 Cal.Rptr. 529 (1973).

Both the magistrate and the district court in this case recognized confidentiality with respect to inmate files maintained on the plaintiffs by the California Department of Corrections and took steps to protect that confidentiality by restricting access to them. The same protective order applies to the personnel files, but is insufficient to protect their greater confidentiality.

Disclosure of personnel files for adversary inspection is far different from disclosure to an advocate of his own client's file. Without disparaging opposing counsel, petitioners urge that the confidentiality of their personnel records deserves at least the protection of an *in-camera* inspection for relevance and materiality prior to release of their contents for adversary inspection.

Petitioners' legitimate interests in maintaining confidentiality with respect to their own personnel files,



and the personnel files of the hearing representatives who are not even parties to this action, is greater than their interests in maintaining confidentiality with respect to the inmates' files. Not only do defendants have a stronger interest respecting the confidentiality of their own personnel files, but, unlike the contents of the plaintiffs' inmate files which may contain information relevant to the action, the contents of the personnel files are irrelevant. Accordingly, disclosure of the officials' personnel files should be ordered with a good deal more caution than disclosure to the plaintiffs of files containing personal information about them. This should be evident as a general proposition, and it should be especially evident where plaintiffs are state prisoners and where the personnel files demanded by them contain personal information respecting the members of the parole board, and the hearing representatives who function as surrogates much as United States Magistrates function with respect to the district courts.

Where, as here, both California and federal law agree in recognizing the confidentiality of personnel records, it is appropriate for the district court to recognize the confidentiality raised by state officials, see, *Baird v. Koerner,* 279 F.2d 623, 632 (9th Cir. 1960), and to take reasonable steps to avoid an unnecessary or unwarranted invasion of the confidentiality. Thus, even if the confidentiality asserted by petitioners with respect to their own personnel files does not rise to a level of absolute privilege under state or federal law, it is nevertheless clear that there is at least a qualified privilege and that disclosure of

the personnel files should be ordered only where there appears a compelling need for their contents and then only after an *in-camera* inspection has been conducted by the district judge to determine whether the need outweighs the significant private interests and significant governmental interests involved in this case. See, *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 783, 788, 792 (D.C. Cir. 1971); *Carr v. Monroe Manufacturing Company*, 431 F.2d 384 (5th Cir. 1970); *Pleasant Hill Bank v. United States*, 58 F.R.D. 97 (W.D. Mo. 1973). Cf. *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 ..... 1970; *Walker v. Liberty Mutual Company*, 48 F.R.D. 365 (E.D. Wis. 1970).

Indeed, such an approach was actually followed by another judge of the district court in *VunCannon v. Breed*, No. C-70-2423 OJC, United States District Court for the Northern District of California. In *VunCannon*, a civil rights action by a prisoner against a state official, the magistrate ordered personnel files produced for an *in-camera* inspection "to ascertain and to determine as to each document, its relevance, and as to each the need, if any, for maintenance of confidentiality in the public interest" (Findings of May 2, 1973, at page 2). After the *in-camera* inspection, the magistrate found nothing in the personnel files relevant to the action (Findings of May 18, 1973). These findings were accepted by the district court (Order of July 23, 1973).



***Plaintiffs Have Advanced No Compelling Need for the Personnel Files:***

In the instant case, no compelling need for the contents of the personnel files was advanced by plaintiffs and none was found by the district court. The district court nevertheless refused defendants' request that disclosure of the contents of their personnel files and of the personnel files of the hearing representatives who are not even parties to the action, be ordered only after an *in-camera* inspection to determine their relevance and materiality. As indicated earlier in this petition, the total number of personnel files involved is only about 25. Accordingly, we urge that the obvious and recognized interests of the defendants in reasonably preserving the confidentiality of their personnel files outweighs plaintiffs' expressions of speculative relevance and need for the documents such that, at the very minimum, an *in-camera* inspection is called for prior to disclosure to plaintiffs of any of the contents of the files. Inspection by plaintiffs without an *in-camera* inspection to determine relevance and materiality would violate the Fourth Amendment, which applies to discovery under the Federal Rules. *Security and Exchange Commission v. Los Angeles Trust D. & M. Exchange*, 24 F.R.D. 460, 463 (S.D. Cal. 1959).

## III

### The District Court Clearly Erred in Ordering the General Production of Adult Authority and Department of Corrections' Records.

Petitioners contend that the district court's finding that plaintiffs are entitled to State documents generally is clearly erroneous. Upon reaching that conclusion, the district court should have ordered, at least, that the petitioners produce this information *in-camera* so that he could weigh the need for disclosure against the State's interest in continuing confidentiality. We respectfully urge this Court to recognize these claims of privilege for, if federal courts will not, they have been effectively rendered meaningless.

> "If this Court were to accept petitioner's contention that this privilege should be approached in an *ad hoc* manner, being dissolved when necessity for the privileged information is shown, and no specific reasons for the upholding of the privilege advanced, then the underlying reasons for the existence of the privilege would be thwarted just as fully as if it did not exist." *Koth v. Perini,* 283 F.Supp. 1 (N.D. Ohio 1968).[5]

[5]The state's interests in the confidentiality of records are many, but three come immediately to mind: (1) the protection of individuals, including informants inside and outside of prison and insuring institutional security. See *Morrissey v. Brewer,* 408 U.S. 471, 487 (1972); *McCray v. State of Illinois,* 386 U.S. 300, 308-309 (1967); *In re Prewitt,* 8 Cal.3d 470, 475-476, 105 Cal.Rptr. 318, 322-323 (1972); *In re Harrell,* 2 Cal.3d 675, 691, 87 Cal.Rptr. 504, 514 (1970), *cert. denied,* 401 U.S. 914; (2) encouraging candor and complete disclosure of information concerning inmates from both public officials and private citizens, see Califfornia Evidence Code section 1040; *Chronicle Publishing Company v. Superior Court,* 54 Cal.2d 548, 568-570, 7 Cal.Rptr. 109, 121-122 (1960); (3) the requirements of certain statutes providing for the confidentiality of statements and recommendations submitted by the judge, district attorney, and sheriff [Calif. Pen. Code §§ 3046, 1203.01], or in response to notices given under California Penal Code sections 3022 and 3042, and a limitation respecting the inspection of certain criminal records (Pen. Code §§ 11105(b), 11120, 11122-11125].



Plaintiffs' request for documents, Nos. 15, 18, 20, 21, and 22, seek preliminary drafts, notes, interagency or intra-agency memorada to which defendants have asserted the privilege recognized in California Government Code section 6454(a). Compare Title 5, U.S.C. § 552(b)(5). The purpose for these exemptions is, of course, to encourage the free exchange of ideas during the process of deliberation and policy making. *Soucie v. David,* 448 F.2d 1067, 1077-1078 (D.C. Cir. 1971). The disclosure of such memorandum have been recognized as having a detrimental effect on a governmental agency's decision making process.

> "[A] full and frank exchange of opinion would be impossible if all internal communications were made public. [Agency witnesses] contended, and with merit, that advice from staff assistants in the exchange of ideas among agency personnel would not be completely frank if they were forced 'to operate in [a] fish bowl.'" *Sterling Drug, Inc. v. S.T.C.,* 450 F.2d 698, 706-707 (D.C. Cir. 1971) [quoting from 10 (1966) U.S. Congressional and Administrative News, p. 2427].

Upon concluding that the plaintiffs made a sufficient showing of relevancy to be entitled to this information, a finding with which we do not concur, in order to protect the effectiveness of governmental decision-making processes, the district court should

have required an "*in-camera*" inspection of these materials before ordering their blanket production. Compare *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792 (D.C. Cir. 1971).

An additional objection is made to the production of investigative reports by members of the Adult Authority (plaintiffs' request No. 14), since these are reports of investigations conducted by state agencies for correctional purposes. As such they are entitled to the privilege conferred by California Government Code section 6542(f), which is similar to the privilege recognized in Title 5, United States Code section 552(b)(7).

## IV

### Mandamus Is an Appropriate Remedy for Reviewing a Discovery Order.

Issuance of a writ of mandate is an appropriate exercise of the supervisory powers of this Court over the district courts in this circuit. *Harris v. Nelson,* 394 U.S. 286 (1969); *Schlagenhauf v. Holder,* 379 U.S. 104, 110 (1964); *United States Board of Parole v. Merhige,* 487 F.2d 25, 29-30 (4th Cir. 1973); *Hartley Pen Company v. United States District Court, etc.,* 287 F.2d 324 (9th Cir. 1961).

Of particular interest is the opinion in *United States Board of Parole v. Merhige, supra.* That case involved a civil action brought by federal prisoners who filed a sweeping challenge against procedures followed by the United States Board of Parole in determining whether to grant or deny parole to federal prisoners.



The district court had ordered the members of the parole board to answer a series of interrogatories respecting procedures followed by the parole board and information relied on in denying paroles with respect to a number of specified federal prisoners. The United States Court of Appeals for the Fourth Circuit held that the interrogatories amounted to an unwarranted violation of the recognized confidentiality of the board's records and would place an unreasonable burden on the parole authorities. The Court of Appeals also held that mandamus was appropriate to vacate the clearly erroneous order of the district court.

In the instant case the defendant officials' interests in the personnel files are significantly greater, and the interests of the plaintiff prisoners significantly less than their counterparts' interests in *Merhige.* Moreover, the measures which we request that the district court be required to take to preserve this great confidentiality are less than the measures advanced in *Merhige* where the United States Board of Parole declined to furnish *any* answers to the inquiries subject to review on mandate. The Court of Appeals' rulings in *Merhige* in effect made the confidentiality absolute. Petitioners in the instant case urge this Court at the minimum to vacate the district court's order and to afford at least a qualified confidentiality to the personnel records by requiring the district judge to conduct an *in-camera* inspection prior to ordering disclosure.

Finally, mandate is appropriate because any review on appeal after access to these files has been provided

in compliance with the district court's order could not undo the harm accomplished by the disclosure.

## V

### The District Court's Order for Disclosure of the Personnel Files Should Be Stayed Pending Disposition of This Petition.

Petitioners requested the district court to stay only that part of its order which requires disclosure of the personnel files pending disposition of this petition. The district court denied the request (Exhibit E, pp. 2-3) after counsel for plaintiffs said that the petition would be without merit and objected to delaying disclosure of the personnel files.

If this petition is without merit, any delay pending its deposition will be minimal in view of the promptness with which this Court acts in such matters.

If this petition has merit, as it does, then for all of the reasons above, any delay will be *ipso facto* justified pending final disposition of the petition on its merits.

### Conclusion

For the foregoing reasons, petitioners respectfully request that this petition for writ of mandamus or prohibition be granted to vacate the unprecedented order of the district court to the extent that it would require disclosure of the personnel files and other papers demanded by plaintiffs and to prohibit the district court from ordering disclosure of any of the contents of the personnel files and documents until



there has first been an *in-camera* inspection of them and a determination with respect to each document that it is relevant, and that its materiality outweighs the need for its confidentiality.

For the reasons set forth above, petitioners also respectfully request that the part of the district court's order which requires disclosure of personnel files be stayed pending disposition of this petition.

Dated: June 25, 1974

Evelle J. Younger, Attorney General
of the State of California

Jack R. Winkler, Chief Assistant
Attorney General—Criminal Division

Edward P. O'Brien
Assistant Attorney General

Derald E. Granberg
Deputy Attorney General

/s/ John T. Murphy
John T. Murphy
Deputy Attorney General

Karl S. Mayer
Deputy Attorney General
Attorneys for Petitioners

[Statement of Service Omitted in Printing]

KSM:pm

## Exhibit A

[The text of Exhibit A, Plaintiffs' Complaint filed in the district court on November 15, 1972, has heretofore been printed in this appendix and appears at pages 8-50 above.]

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## Exhibit B

[The text of Exhibit B, Plaintiffs Request For Documents filed in the district court on June 21, 1973 has heretofore been printed in this appendix and appears at pages 51-56 above.]

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## Exhibit C

[The text of Exhibit C, the Magistrate's Findings and Recommendations filed in the district court April 24, 1974, is omitted in the printing of this appendix and appears in the printed Petition For Writ of Certiorari, appendix, pages, xviii-xxii.]

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## Exhibit D

[The text of Exhibit D, Plaintiffs' Motion For Order Compelling Discovery, filed in the district court on March 11, 1974, has heretofore been printed in this appendix and appears at pages 76-146 above.]



## Exhibit E

[The text of Exhibit E, Order of the district court dated June 20, 1974, is omitted in the printing of this appendix and appears in the printed Petition For Writ of Certiorari, appendix, pages xv-xvii.]

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## Exhibit F

**In the United States District Court**
**for the Northern District of California**

[Caption Omitted in Printing]

PLAINTIFF'S FIRST SET OF INTERROGATORIES

To: Defendants Henry W. Kerr, Curtis O. Lynum, Walter A. Gordon, Jr., Manley J. Bowler, Leland M. Edman, James H. Hoover, Charles E. Brown, Daniel R. Lopez, Joseph A. Spangler, and Raymond K. Procunier and their attorneys Evelle J. Younger and Karl Mayer:

Pursuant to Rule 33, Federal Rules of Civil Procedure, you are hereby required to answer the following interrogatories, separately and fully in writing and under oath, within thirty days from the date of service hereof.

In answering these Interrogatories, furnish all information which is available to you, including information in the possession of your employees, agents and servants and representatives and all others from whom you may freely obtain it, as well as from your attorneys and their investigators.

1. For each of the eight defendant members of the Adult Authority, state the following:

a) date of appointment to Adult Authority;

b) birthplace, birthdate and age;

c) education: names and dates and location of high school, college, graduate, professional or technical schools and other courses;

d) work experience: please name work title, dates of employment for each position held since high school. Specifically include experiences defending clients against criminal charges; experiences prosecuting criminals; and experiences investigating criminal activity;

e) dates and branch of military service and date and type of discharge;

f) all cities of residence, since birth;

g) amount of highest and of lowest annual income in past 20 years;

h) political party affiliation;

i) record of criminal involvement--arrests, convictions;

j) periodicals which you currently subscribe to;

k) years spent unemployed;

l) Occupations of wife and children (if applicable).

2. For each of the Adult Authority Hearing Representatives, (except those appointed after date of filing the complaint herein) please provide the information requested in the preceding question.



3. With respect to each member of the AA state:

a) the title, date and location of each published article written by him since he became a member of the Adult Authority;

b) the date, title, occasion, audience and location of the transcript of each speech made by a current Adult Authority member which relates in any way to the duties, policies or practices of the prison system;

c) the titles, dates and places of publication of any other article written by any current Adult Authority member on any subject.

4. Please list the dates and places of any formal or informal meetings of members with the following groups from January 1970 to the present date:

a) inmate organizations; (prisoner's unions or other organizations);

b) community prisoner support organizations;

c) legislators;

d) parolees;

e) parole officers;

f) judges;

g) correctional officers organizations.

5. Please state the date, place and occasion of the most recent visit of each defendant to each of the following:

a) prison living quarters;

b) adjustment centers;

c) a half-way house;

d) an in-prison vocational or counselling program.

6. With respect to each of the named plaintiffs, state the date on which the Adult Authority last took action in connection with the length of his sentence or parole status. The plaintiffs are:

John van Geldern
Danny Jones
Charles Edward van Nort
Billy Ray Lewis
Robert Newton Gardner, Jr.
James Murrin
George Chatfield

7. In the case of each plaintiff, state whether this action was preceded by an interview with him and if so, the date of each plaintiff's interview by the members or hearing representative, the place of the interview, the exact length of the interview and the names of all persons present.

8. In each case, state the time that the panel began hearing cases for that day, the time it terminated hearings, and the times of recesses, and the number of inmates who were interviewed that day.

9. With respect to each of the plaintiffs, state the actual decision of the Adult Authority in each case on their most recent ruling.

10. With respect to each decision made by the Adult Authority referred to in the previous Interrogatory, state whether or not a recommendation was made by the Department of Corrections, any of its agents,



a parole officer, personnel from a program of the Adult Authority (such as the Stress Assessment Unit) or any other official body, and if so, whether the recommendation was for or against parole or continuation on parole.

11. If any recommendation was made, (a) with whom did it originate, (b) what was or is the position of this person, and (c) upon what criteria was the recommendation based? If the recommendation was in writing, attach a copy.

12. What efforts, if any, were made by the panel or Adult Authority, to investigate the basis of each such recommendation.

13. In the cases of each of the named plaintiffs referred to in Interrogatory #6, if the action of the Adult Authority was to deny or delay parole, state the reason or reasons for the Authority's action.

14. In the case of each of the hearings referred to in Interrogatory #7. (a) state how the inmate was notified of the hearing, (b) by whom, (c) on what date, and (d) what was contained in the notification.

15. In each case referred to in Interrogatory #6, state the substance of the discussion; that is, what panel members said to the inmate and what the inmate said to him.

16. In the case of delaying or setting off parole consideration for a specific period, state the criteria used by the Adult Authority in determining what that period should be.

17. In the case of each decision mentioned in answer to Interrogatory #9, state whether, and if so, when, the decision and the reason or reasons for the Adult Authority's action were conveyed to the named plaintiff in question and whether it was conveyed orally or in writing. If in writing, attach a copy of the writing.

18. In the case of each decision mentioned in answer to Interrogatory #9, state whether and when the decision was conveyed to officials at the institution in which the named plaintiff was confined. To what person was it conveyed and on what date? If it was conveyed in writing, attach the writing.

19. In the case of each named plaintiff with respect to whom the Board made a decision, set forth the factor or factors which were considered by the Board in making their decision.

20. In the case of each named plaintiff with respect to whom the Board made a decision, was the information which the Board received, investigated or verified prior to, or after, the Board's decision in the case?

21. In the case of each decision of the Adult Authority mentioned in Interrogatory # 9, state whether the members of the Adult Authority relied on any statutes, regulations or other written standards to guide them in making the decision. Identify each of them by name, location and content.

22. In the case of each named plaintiff, state whether the inmate's pre-sentence report by the proba-



tion officer was considered or was a factor in the Adult Authority's decision, referred to in the answer to Interrogatory #9.

23. In the case of each named plaintiff, state whether the inmate's institutional disciplinary record was a factor in the Adult Authority's decision referred to in the answer to Interrogatory #9.

24. If so, state which disciplinary infractions were considered significant in judging the plaintiff's readiness for parole, and which were considered insignificant and why.

25. Are there any written standards for judging which disciplinary infractions will effect parole and sentencing decisions and which will not? If so, attach the standards.

26. In the case of each named plaintiff, state whether the offense for which the plaintiff was committed to prison was a factor considered by the Board in reaching its decision about parole readiness.

27. If so, state what it is about particular offenses that would justify more or less time of actual imprisonment?

28. Are there any written standards or studies (other than the penal statutes setting minimum and maximum sentences) relied on for determining whether a commission of a particular offense justifies more or less time? (Include *any* writing, including minutes of conferences between Adult Authority members or representatives). If so, please attach the writing.

29. In the case of each named plaintiff, state whether the statement of the judge of the trial court was a factor or was considered by the Board in reaching its decision referred to in answer to interrogatory #9.

30. In the case of each named plaintiff, state whether the length of time served by the inmate at the time of the Board's decision was a minor, major, substantial or predominant factor considered by the Board in reaching its decision referred to in answer to Interrogatory #9.

31. If the Adult Authority's decision not to grant parole was based on the reason that the named plaintiff had not served enough time, state what benefit serving more time is believed to have for the prison, the prisoner, or society.

32. With respect to each named plaintiff, state whether his refusal to participate in prison-run programs played a part in the Adult Authority's decision referred to in answer to Interrogatory #9. If so, state whether the effectiveness of those programs, and/or the inmate's reason for refusal to participate was investigated by the Adult Authority.

33. In the case of each named plaintiff, state whether his desire to remain in the cellblock for personal safety was a factor in the Board's decision referred to in answer to Interrogatory #9. If so, how does such protective action correlate with his suitability for parole?



34. In the case of each named plaintiff who was denied parole release or continuance on parole, state whether the Adult Authority concluded that there was not a reasonable probability that such inmate would live and remain at liberty without violating the law, and in each case, state what the basis for said conclusion was.

35. In the case of each inmate who was denied parole release or continuance on parole, state whether the Board reached the opinion that such release was not compatible with the welfare of society and in each such case, state what the basis was for the Board's opinion.

36. What are the criteria used by the Adult Authority in determining the adequacy and suitability of an inmate's post-release parole plans?

37. In connection with each of the named plaintiffs, state whether the Adult Authority encouraged the submission by interested persons of pertinent and relevant information to it, and if so, how.

38. If the information referred to in the above interrogatory was received in relation to the plaintiffs, what role did it play in the Adult Authority's decision?

39. In the case of each named plaintiff, state whether there were any adverse reports or comments in his file at the time the Adult Authority made its decision referred to in answer to Interrogatory #9. (This should include adverse comments from any source whatsoever.) If so, what were those comments and from whom did they come?

40. In the case of each inmate, state whether his "attitude" was a factor considered by the Adult Authority in deciding whether or not to release or continue him on parole; and if so, state (a) of what this attitude consisted, and (b) what criteria were used to determine its relevance to the parole, term setting, or parole revocation or rescission decisions.

41. Please provide the information requested in Interrogatories #9-40 for decisions made in the cases of the named plaintiffs on or about the dates listed below, unless this information has already been given.

Billy Ray Lewis—April 1972

Danny Jones—December 1971, May 1972, December 1972

Charles Edward van Nort—December 1970 (date rescinded)

Robert Newton Gardner, Jr.—January 1972

John van Geldern—February 1972, May 1972 (en banc)

James Murrin—September 1972 (recission)

George Chatfield—January 1972

42. State the date on which the Adult Authority put into effect a procedure for appeals of its decisions.

43. Since this date, how many appeals have been received by the Adult Authority.

44. Of this number, how many resulted in further investigation by the Adult Authority? Of what did this investigation consist?



45. As a result of appeals, how many decisions were changed?

Dated: June 28, 1973

B. E. Bergesen, III
Fay Stender
Ezra Hendon
Siegfried Hesse
/s/ Ezra Hendon
Attorneys for Plaintiffs

In the United States District Court
for the Northern District of California

[Filed July 23, 1974]

[Caption Omitted in Printing]

DEFENDANTS' ANSWER TO PLAINTIFFS' COMPLAINT AS AMENDED

Defendants Henry W. Kerr, Curtis O. Lynum, Walter A. Gordon, Jr., Manley J. Bowler, Leland M. Edman, James H. Hoover, Charles E. Brown, Daniel R. Lopez, Joseph A. Spangler, and Raymond K. Procunier for an answer to the complaint filed herein on November 15, 1972, admit, deny, and allege as follows:

*First Defense*

1. For answer to paragraph one, defendants deny that this Court has jurisdiction under Title 28, United States Code section 1343, deny that plaintiffs have been deprived of rights, privileges and immunities secured to them by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, or Article I, sections 6, 8 and 13 of the California Constitution, and deny that Title 42, United States Code sections 1983 and 1988, or Title 28, United States Code sections 2201 and 2202 confer jurisdiction upon this Court.

2.a. Defendants admit on information and belief that plaintiffs Chatfield, Jones, and Van Nort are inmates in custody in California state prisons. Defendants deny on information and belief that plaintiffs Van Geldern, Murrin, Lewis and Gardner are inmates in



custody in California state prisons. Defendants, and each of them, deny that they adjudicate infractions of prison rules. Defendant Manley J. Bowler denies that he is a member of the California Adult Authority. Defendants Raymond K. Procunier and Joseph A. Spangler deny that they grant, deny, or rescind parole, or fix or refix sentences. Defendants Kerr, Lynum, Gordon, Edman, Hoover, Brown, and Lopez admit that they participate in hearings which result in granting, denying, or rescinding paroles. Defendants deny that they participate in proceedings to fix or refix sentences. Defendants deny that their decisions deprive thousands of California prisoners of fundamental rights of liberty. Defendants deny the other allegations in paragraph 2.a. of the complaint.

b. Defendants admit that the statutory and decisional law of California requires that decisions respecting the granting, denial, or rescission of parole, and respecting adjudication of infractions of prison rules not be made in an arbitrary manner or without cause. Defendants admit that the hearing procedures followed by the Adult Authority and by the California Department of Corrections comport to applicable requirements of state and federal law. Defendants deny the allegation that such applicable requirements are "as is more fully described below." Complaint p. 2:23-24.

c. Defendants deny each and every allegation in paragraph 2.c. of the complaint.

d. Defendants admit the allegations in paragraph 2.d. of the complaint, except the allegation that: "Said

material is reviewed by the Adult Authority, and is often used to deny or rescind parole," and as to this allegation defendants admit that such material may be reviewed by members of the Adult Authority and may be considered in determining whether to deny or rescind parole.

e. Defendants deny each and every allegation in paragraph 2.e. of the complaint.

f. Defendants deny each and every allegation in paragraph 2.f. of the complaint.

g. Defendants have insufficient information to admit or deny and therefore deny the allegations in paragraph 2.g., lines 23-31 of the complaint. Defendants deny the other allegations in paragraph 2.g. of the complaint.

3. On information and belief, defendants admit that plaintiffs Chatfield, Jones, and Van Nort are inmates in custody in California state prisons. On information and belief, defendants deny that plaintiffs Van Geldern, Murrin, Lewis, and Gardner are inmates in custody in California state prisons and defendants allege that these four persons are on parole.

4. Defendants admit that plaintiffs bring this action as a class action but deny the remaining allegations in paragraph 4 of the complaint and allege that the class is as will be defined in an order to be signed by Judge Weigel.

5. Defendants Kerr, Lynum, Gordon, Edman, Hoover, Brown, and Lopez admit they are members of the California Adult Authority. Defendant Bowler



denies that he is a member of the California Adult Authority. Defendant Spangler admits that he is the administrative officer of the Adult Authority. Defendants Kerr, Lynum, Gordon, Edman, Hoover, Brown, and Lopez admit the allegations in paragraph 5 of the complaint at page 8, lines 3 through 13. Defendants Bowler and Spangler deny the allegations in paragraph 5 at page 8, lines 3-13 of the complaint. Defendant Spangler admits that he has assisted the Adult Authority in making policy and in designing procedures, and denies he has assisted in making de facto determinations critical to the decisions made by the Adult Authority. Defendant Spangler denies he has interpreted laws under which the Adult Authority operates to deny plaintiffs and their classes and subclasses fundamental fairness and due process of law. Defendant Spangler admits he is the chief staff officer and handles all administrative functions as delegated and determined by the Authority. Defendant Spangler admits he is the official keeper of the records of the Adult Authority and admits that he is a liaison officer with the defendant Procunier and the staff of the Department of Corrections, but only to the extent that he is delegated to be such.

6. The defendant Procunier admits that he is the Director of Corrections and as such is the chief administrative officer of the Department of Corrections, and that the supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in him. Defendant Procunier also admits that he may pre-

scribe rules and regulations for the administration of the prisons and may change such rules and regulations at his pleasure. The defendant Procunier also admits that before the release of any inmate the director's duties include providing the Adult Authority with a written evaluation of the inmate's readiness for release. The defendant Procunier otherwise denies the allegations in paragraph 6 of the complaint.

7. Defendants deny the allegations in paragraph 7 of the complaint.

8. Defendants deny the allegations in paragraph 8 of the complaint.

9.a. Upon information and belief defendants admit that plaintiff Lewis was released on parole in March of 1972, that his parole plan was based upon his working, and that he commenced his employment. Defendants have insufficient information upon which to admit or deny, and therefore deny, the balance of the allegations in paragraph 9.a. of the complaint.

b. Defendants have insufficient information upon which to admit or deny, and therefore deny, the allegations in paragraph 9.b. of the complaint.

c. Defendants have insufficient information upon which to admit or deny, and therefore deny, the allegations in paragraph 9.c. of the complaint.

d. Defendants have insufficient information upon which to admit or deny, and therefore deny, the allegations in paragraph 9.d. of the complaint.

e. Upon information and belief defendants admit the allegations in paragraph 9.e. of the complaint that



"plaintiff [Lewis] was returned to prison in December of that year appeared before the Adult Authority on parole violation charges" . . . that plaintiff pled not guilty to the charges, that the Adult Authority found him guilty, that he was required by the Adult authority to undergo a psychiatric examination and to obtain a psychiatric clearance prior to his next parole hearing in May of 1972, and that plaintiff Lewis was given such an examination and given a psychiatric clearance. Upon information and belief defendants deny the other allegations in paragraph 9.e. of the complaint.

f. Upon information and belief the defendants admit the allegations in paragraph 9.f. of the complaint, except the allegation that there was an attorney willing and able to appear on behalf of plaintiff Lewis and as to that allegation defendants have insufficient information upon which to admit or deny and therefore deny it, and defendants upon information and belief deny the allegation that the charges against plaintiff Lewis were false or that he was denied an opportunity to rebut them.

g. Upon and information and belief the defendants deny the allegations in paragraph 9.g. of the complaint.

10.a. Upon information and belief defendants admit the allegations in the first sentence of paragraph 10.a., page 11 of the complaint. Upon information and belief the defendants deny the allegations in the second sentence of paragraph 10.a., page 11 of the complaint. Defendants have insufficient information

upon which to admit or deny, and therefore deny, the allegations in the third sentence of paragraph 10.a., pages 11-12 of the complaint. Upon information and belief the defendants admit the allegation in the fourth sentence of paragraph 10.a., page 12 of the complaint. Defendants have insufficient information upon which to admit or deny, and therefore deny, the allegations in the last sentence of paragraph 10.a., page 12 of the complaint.

b. Upon information and belief defendants admit the allegation in the first sentence of paragraph 10.b., page 12 of the complaint. The defendants have insufficient information upon which to admit or deny, and therefore deny, the balance of the allegations in paragraph 10.b. of the complaint.

c. With respect to the allegations in paragraph 10.c., pages 12-13 of the complaint, defendants have insufficient information upon which to admit or deny, and therefore deny, the allegations in the first sentence thereof. With regard to the balance of the allegations in paragraph 10.c., pages 12-13 of the complaint, the defendants upon information and belief deny the allegations, except for the allegations in the last sentence of paragraph 10.c., of the complaint, and as to the allegations in that sentence the defendants have insufficient information and belief upon which to admit or deny, and therefore deny the allegations.

d. Defendants have insufficient information upon which to admit or deny, and therefore deny the allegations in the first sentence of paragraph 10.d., page 13 of the complaint. Defendants allege on information and belief that plaintiff Jones was charged with disciplinary infractions occurring on September 26, 1970, including charges of improper inmate behavior, disobeying orders, and displaying disrespect toward prison officials. Upon information and belief defendants admit the allegations in the second sentence of paragraph 10.d. of the complaint, except for the allegation that the disciplinary committee was composed of the same staff members who had opposed plaintiff's participation in the work furlough program and as to that allegation defendants have insufficient information upon which to admit or deny, and therefore deny it. Upon information and belief defendants admit the balance of the allegations in paragraph 10.d. of the complaint, except as to the allegation that the Adult Authority interview lasted less than 2 minutes and as to that allegation defendants have insufficient information upon which to admit or deny, and therefore deny it. Defendants allege upon information and belief that at the disciplinary hearing the plaintiff Lewis pled guilty to the charges of disciplinary infractions.



e. Upon information and belief the defendants admit the allegations in paragraph 10.e., page 13 of the complaint, except for the allegation that plaintiff Jones opposed participation in the work furlough program and as to that allegation defendants deny it upon information and belief. Defendants allege upon information and belief that plaintiff Jones affirmatively requested to remain on the work furlough program but was thereafter counseled by program ad-

ministrator W. O'Connor that a return to the work furlough program at C.I.M. may be problematical.

f. Upon information and belief the defendants admit the allegations in the first sentence of paragraph 10.f., pages 13-14 of the complaint. Defendants upon information and belief deny the allegation in the second sentence of paragraph 10.f., page 14 of the complaint and allege that plaintiff Jones was properly advised of the reasons for the "investigation." Defendants have insufficient information upon which to admit or deny, and therefore deny the balance of the allegations in paragraph 10.f., page 14 of the complaint.

g. Upon information and belief the defendants admit the allegations in the first sentence of paragraph 10.g., page 14 of the complaint, except for the allegation that plaintiff was mistakenly arrested and as to that allegation defendants deny it. With respect to the allegations in the second sentence of paragraph 10.g., page 14 of the complaint, the defendants admit that plaintiff Jones appeared before defendants Kerr and Edman on December 7, 1971, but, upon information and belief, deny the balance of the allegations in that sentence. Upon information and belief the defendants admit the allegations in the third and last sentence of paragraph 10.g., page 14 of the complaint.

h. Upon information and belief the defendants admit the allegations in paragraph 10.h., page 14 of the complaint, except for the allegation that the disciplinary report was falsified and as to that allegation defendants deny it upon information and belief.



i. Upon information and belief defendants admit the allegations in paragraph 10.i., page 15 of the complaint, except for the allegation that the Adult Authority hearing lasted approximately 90 seconds and as to that allegation the defendants have insufficient information upon which to admit or deny, and therefore deny it.

j. Upon the information and belief the defendants deny the allegations in paragraph 10.j., page 15 of the complaint, except for the allegations that plaintiff Jones was not permitted to call persons to appear at the Adult Authority hearing for purposes of cross-examining them, and the allegation that plaintiff Jones was not permitted to be represented by counsel and as to those allegations the defendants admit them upon information and belief.

11.a. Upon information and belief the defendants admit the allegations in paragraph 11.a., page 15 of the complaint.

b. Defendants have insufficient information upon which to admit or deny, and therefore deny the allegations in paragraph 11.b., pages 15-16 of the complaint.

c. Defendants have insufficient information upon which to admit or deny, and therefore deny the allegations in paragraph 11.c., page 16 of the complaint.

d. Upon information and belief the defendants admit the allegations in paragraph 11.d., page 16 of the complaint, that on or about November 20, 1970, plaintiff Van Nort was brought before a disciplinary

committee at Chino, that he entered a plea of guilty to the charged disciplinary infraction, that the disciplinary committee recommended that plaintiff's parole date of December 1, 1970, be rescinded, and that plaintiff sign a document setting forth the nature of his offense. Upon information and belief defendants deny the other allegations in paragraph 11.d., page 16 of the complaint.

e. Upon information and belief the defendants admit that the allegations in paragraph 11.e., pages 16-17 of the complaint, except for the allegation in the second sentence thereof where it is stated by plaintiff that "he was told only that the 'incident' was under investigation by the Los Angeles County District Attorney," and as to that allegation the defendants deny it upon information and belief. The defendants allege upon information and belief that the report of plaintiff's misbehavior was discussed with plaintiff.

f. Defendants have insufficient information upon which to admit or deny, and therefore deny the allegations in the first sentence of paragraph 11.f., page 17 of the complaint. Upon information and belief the defendants admit the allegation in the second sentence of paragraph 11.f. of the complaint and upon information and belief the defendants deny the allegation in the third and final sentence of paragraph 11.f., page 17 of the complaint.

g. Defendants have insufficient information upon which to admit or deny, and therefore deny the allegations in the first sentence of paragraph 11.g., page



17 of the complaint. Defendants deny, upon information and belief, the allegations in the second sentence of paragraph 11.g., page 17 of the complaint. Defendants have insufficient information upon which to admit or deny and therefore deny the allegations in the balance of paragraph 11.g., page 17 of the complaint. With respect to the proceedings to which paragraphs 11 of the complaint make reference, defendants assert upon information and belief that the plaintiff Van Nort admitted drinking, admitted leaving work, and admitted that the rescission of his parole was justified.

h. Upon information and belief the defendants deny the allegations of paragraph 11.h., page 18 of the complaint, except as follows herein: The defendants admit plaintiff Van Nort's allegations that he was not permitted to call persons at Adult Authority hearings for the purpose of cross-examining them, that he was not permitted to be represented by counsel at the Adult Authority hearings, and that after rescission of his parole plaintiff Van Nort was assigned to the stress assessment unit; defendants have insufficient information upon which to admit or deny, and therefore deny, plaintiff Van Nort's allegations that correctional staff members at C.M.C. informed him that he must dismiss all litigation concerning his parole rescission or be taken out of the stress assessment unit and be ineligible for parole consideration.

12.a. Upon information and belief the defendants admit the allegations in the first two sentences of paragraph 12.a., pages 18-19 of the complaint, except

for the allegation that plaintiff Gardner was unaware of the Adult Authority hearing in December of 1959 and as to that allegation defendants have insufficient information upon which to admit or deny and therefore deny it. Upon information and belief defendants deny that plaintiff Gardner's parole was revoked subsequent to his discharge date as alleged in the final sentence of paragraph 12.a., page 19 of the complaint, but admit upon information and belief that plaintiff's parole was revoked and that he was returned to custody. Upon information and belief defendants allege that plaintiff Gardner's parole was suspended in December 1959 upon his arrest for possession in his home of 15 prophylactics containing heroin and that his parole was revoked following his conviction in February 1960 of two counts of violation of California Health and Safety Code section 11500 (possession of narcotics).

b. Upon information and belief defendants admit the allegations in paragraph 11.b., page 19 of the complaint, except for the allegation in the last sentence thereof, and as to that allegation defendants have insufficient information upon which to admit or deny and therefore deny it.

c. Upon information and belief defendants admit the allegation in the first sentence of paragraph 11.c., page 19 of the complaint. With respect to the allegations in the second sentence of paragraph 12.c., page 19 of the complaint defendants have insufficient information upon which to admit or deny, and therefore deny such allegations. Defendants upon information



and belief deny the allegations in the last sentence of paragraph 12.c., page 19 of the complaint.

d. Upon information and belief defendants admit the allegations in the first sentence of paragraph 12.d., page 19 of the complaint. Upon information and belief the defendants admit the allegations in the second sentence of paragraph 12.d., pages 19-20 of the complaint, except for the allegation that plaintiff did not get along with representative Halderman and as to that allegation defendants have insufficient information upon which to admit or deny and therefore deny it. With respect to the allegations in the third sentence of paragraph 12.d., page 20 of the complaint, defendants upon information and belief deny the allegation that Mr. Halderman refused to listen to plaintiff, have insufficient information upon which to admit or deny and therefore deny the allegation that Mr. Halderman referred to plaintiff as a "troublemaker," and admit the allegation that it was recommended that plaintiff's parole be revoked and that he be removed from the STRU program. Defendants upon information and belief admit the balance of the allegations in the last two sentences of paragraph 12.d. of the complaint, except for the allegation that three attorneys had requested to appear on behalf of plaintiff and as to that allegation defendants have insufficient information upon which to admit or deny and therefore deny it.

e. Upon information and belief defendants deny the allegations in paragraph 12.e., page 20 of the complaint.

f. Upon information and belief the defendants deny the allegations in paragraph 12.f., page 20 of the complaint, except for the allegations of plaintiff Gardner that he was not afforded the right to call witnesses in his own behalf, to call witnesses against him for the purpose of confronting and cross-examining them, and to be represented by counsel and as to those allegations the defendants admit them upon information and belief. Defendants allege upon information and belief that plaintiff Gardner admitted and pled guilty to the charges of violation of parole with respect to which allegations and paragraphs 12.b. through 12.f., pages 19-20 of the complaint, are addressed.

13.a. Upon information and belief the defendants admit the allegations in the first sentence of paragraph 13.a., page 20 of the complaint. Upon information and belief the defendants admit the allegations in the second sentence of paragraph 13.a., pages 20-21 of the complaint, except for the allegation that it was in February of 1969 that plaintiff Van Geldern was returned to prison and as to that allegation defendants deny it upon information and belief. Defendants allege that plaintiff Van Geldern was returned to prison in March of 1969. Upon information and belief the defendants admit the balance of the allegations in paragraph 13.a., page 20 of the complaint. Defendants upon information and belief allege that between April 1969 and February 1970 plaintiff Van Geldern was out to court in the Superior Court for Ventura County for trial on criminal charges upon which his suspension of parole and return to prison



were based in March of 1969. Defendants allege upon information and belief that plaintiff Van Geldern's parole was revoked in June of 1970 and that among the factors taken into account at the time of this revocation was plaintiff's new conviction from Ventura County including some 37 separate counts of felony and that the conduct upon which this conviction was based occurred while Mr. Van Geldern was on parole.

b. Upon information and belief the defendants admit the allegations in the first sentence of paragraph 13.b., page 21 of the complaint. Defendants have insufficient information to admit or deny and therefore deny the allegations in the second and third sentences of paragraph 13.b, page 21 of the complaint and defendants allege that plaintiff Van Geldern admitted during the course of the February 1972 hearing to a loss to his investors of "maybe $100,000." Upon information and belief the defendants deny the allegations in the third and fourth sentences of paragraph 13.b., page 21 of the complaint. With respect to the allegations in the fifth sentence of paragraph 13.b., page 21 of the complaint, the defendants upon information and belief admit that reporter's transcripts of Van Geldern's Ventura trial were not considered, but as to the balance of the allegations in that sentence defendants have insufficient information upon which to admit or deny and therefore deny them.

c. Upon information and belief the defendants admit the allegations in the first sentence of paragraph 13.c., page 21 of the complaint, except for the allegation that plaintiff Van Geldern was told that

8 members of the Adult Authority would be "assisted by defendant Spangler," and as to that allegation the defendants have insufficient information upon which to admit or deny and therefore deny it. Upon information and belief the defendants admit the allegations in the second sentence of paragraph 13.c., pages 21-22 of the complaint.

d. Upon information and belief the defendants deny the allegations set forth in the first sentence of paragraph 13.d., page 22 of the complaint. Defendants have insufficient information upon wihch to admit or deny, and therefore deny the allegations in the second sentence of paragraph 13.d., page 22 of the complaint. With respect to the allegations in the third and last sentence of paragraph 13.d., page 22 of the complaint defendants upon information and belief admit those allegations, except for the allegations that plaintiff Van Geldern has been denied the opportunity to present evidence in his behalf at hearing before the Adult Authority, and as to that allegation the defendants, upon information and belief, deny it.

14.a. Upon information and belief the defendants admit the allegations in the first six sentences of paragraph 14.a., pages 22-23 of the complaint, except for the allegation with respect to the plaintiff Murrin's belief regarding the physical fitness training program and as to that allegation the defendants have insufficient information upon which to admit or deny, and therefore deny it. Upon information and belief the defendants deny the allegations in the seventh sentence of paragraph 14.b., page 23 of the complaint.



Upon information and belief the defendants admit the allegations in the eighth and ninth sentences of paragraph 14.a., page 23 of the complaint. Upon information and belief the defendants allege that plaintiff Murrin ultimately did participate in the physical fitness program at Jamestown and that when he began to do so, he completed all the requirements quickly and passed the course with some 200 points in excess of the minimum required for completion.

b. Upon information and belief the defendants admit the allegations in the first six sentences of paragraph 14.b., page 23 of the complaint. Upon information and belief the defendants deny plaintiff Murrin's allegations that he was not permitted any opportunity to submit evidence at the disciplinary and Adult Authority proceedings to which paragraphs 14.a. and b. of the complaint make reference, and deny that plaintiff Murrin's contention at those hearings were not fairly considered. Upon information and belief the defendants admit that prior to the disciplinary hearings and Adult Authority proceedings to which reference is made in paragraph 14.a. and b. of the complaint plaintiff Murrin was not permitted to review his file or to have representation by counsel or a counsel substitute. Upon information and belief the defendants admit the balance in the allegations of paragraph 14.b. of the complaint, except for the allegations in the last sentence thereof on page 24 of the complaint where it is alleged that there was no good cause nor any legal cause whatsoever to rescind his term fixing and parole date and as to that allegation the defendants deny upon information and belief.

15.a. Upon information and belief the defendants admit the allegations in the first sentence of paragraph 15.a., page 24 of the complaint. With respect to the balance of the allegations in paragraph 15.a. of the complaint the defendants have insufficient information upon which to admit or deny and therefore deny such allegations.

b. Upon information and belief the defendants admit the allegations set forth in paragraph 15.b., pages 24-25 of the complaint.

c. Upon information and belief the defendants admit the allegations set forth in paragraph 15.c., page 25 of the complaint.

d. Upon information and belief the defendants admit the allegations in the first sentence of paragraph 15.d., page 25 of the complaint. Upon information and belief the defendants deny the allegations in the second sentence of paragraph 15.d., page 25 of the complaint.

e. Defendants have insufficient information upon which to admit or deny, and therefore deny the allegations in the first sentence of paragraph 15.e., page 25 of the complaint. Upon information and belief the defendants admit the allegations in the second sentence of paragraph 15.e., page 25 of the complaint. Upon information and belief defendants deny the allegations in the third sentence of paragraph 15.e., page 25 of the complaint.

f. Upon information and belief the defendants deny the allegations in the first sentence of paragraph



15.f., page 26 of the complaint and allege that plaintiff Chatfield appeared before two Adult Authority hearing representatives in December of 1971. Defendants have insufficient information upon which to admit or deny, and therefore deny the allegations in the second through sixth sentences of paragraph 15.f., page 26 of the complaint, except for the allegation in the sixth sentence that the hearing was adjourned and rescheduled for January 1972, and as to that allegation the defendants admit it upon information and belief. The defendants upon information and belief allege that the hearing was adjourned for the purpose of enabling more information to be gathered and submitted. Upon information and belief the defendants admit that the plaintiff Chatfield was not represented by counsel at the hearings in December 1971 and January 1972, but upon information and belief deny the other allegations in the seventh and eighth sentences of paragraph 15.f., page 26 of the complaint. Upon information and belief the defendants admit the allegations in the eighth and ninth sentences of paragraph 15.f., page 26 of the complaint. Defendants upon information and belief allege that during plaintiff Chatfield's hearing in January 1972, the charges of parole violations were discussed with him, that each count of parole violation was read and discussed individually with plaintiff Chatfield and that from Chatfield's verbal statements a no contest plea was interpreted. Defendants also allege upon information and belief that the members of the panel who heard plaintiff Chatfield's case in January 1972 voted in plaintiff's absence.

g. Upon information and belief the defendants deny the allegations in paragraph 15.g., page 26 of the complaint.

16. Upon information and belief the defendants deny the allegations in paragraph 16.a., page 26 through 16.j., page 30 of the complaint, except for the allegation in paragraph 16.f., page 28 of the complaint that inmates are often told at a term-fixing hearing that particular accomplishments are expected of them prior to their next appearance for consideration of parole and as to that allegation the defendants admit it upon information and belief.

17. Defendants deny the allegations in paragraph 17, pages 30-31 of the complaint.

18. Defendants deny the allegations in paragraph 18, page 31 of the complaint.

*Second Defense*

With respect to paragraphs 2 through 18, defendant Spangler incorporates by reference all prior admissions, denials and allegations set forth in the First Defense. Defendant Spangler further asserts that he does not and has not personally voted, recommended, or particpated in any of the Adult Authority or Department of Corrections hearing procedures to which the complaint makes reference and the defendant Spangler further asserts that he does not personally make Adult Authority or Department of Corrections policy statements or rules of procedure. Defendant Spangler further asserts that he did not personally participate in any of the proceedings or decisions to



which the complaint makes reference. Defendant Spangler further asserts that in his capacity as administrative officer for the California Adult Authority he lacks any power or authority or jurisdiction to prescribe or enforce rules of the Department of Corrections respecting either the procedures to be followed for adjudication of inmate disciplinary infractions or with respect to the contents of an inmate's file. Defendant Spangler further asserts that in his official capacity as administrative officer of the California Adult Authority he is without authority, jurisdiction, or power to prescribe rules, policies, or procedures respecting the conduct of hearings which result in recommendations or determinations of whether to grant, deny, rescind, suspend of revoke parole, or to fix or refix the terms of California state prisoners. Defendant Spangler further asserts he neither performs nor is he authorized to perform functions or activities which affect or impair plaintiffs' alleged rights under the United States Constitution or under the California Constitution. Defendant Spangler therefore asserts that he is an improper party defendant and that the complaint fails to state a claim against him upon which relief can be granted.

*Third Defense*

With respect to paragraphs 2 through 18 the defendant Procunier incorporates by reference all prior admissions, denials, and allegations of the First Defense. Defendant Procunier further asserts that neither personally nor in his official capacity as Director of Corrections does he vote, recommend, or otherwise

participate in hearings or decisions made by the California Adult Authority or by the hearing representatives of the California Adult Authority respecting the granting, denial, rescinding, suspension, or revocation of parole, or in the fixing or refixing of terms of California state prisoners. Defendant Procunier acknowledges that in his official capacity as Director of Corrections his responsibilities include prescribing rules and procedures for determining whether inmates have violated rules and regulations governing their behavior and asserts that such rules and procedures have in the past and continue to comport to applicable requirements of the United States Constitution and of the Constitution of California. Defendant Procunier further asserts that the rules, regulations, and procedures followed by the California Department of Corrections for determining inmate disciplinary infractions have been and continue to be fair and equitable, fair and impartial in the constitutional sense are designed to be and are effective to expose and develop the critical facts upon which the Department of Corrections decisions are made, and are designed to be and are effective to apply to such facts appropriate criteria in order to reach a rational, correct, and fair decision as a matter of law. Defendant Procunier further asserts that the decisions routinely reached by the Department of Corrections respecting disciplinary infractions by inmates are neither arbitrary, nor discrminatory, nor violative of inmates' rights under the United States Consitutition or under the Constitution of California. The defendant Procunier further asserts that the procedures followed by the Depart-



ment of Corrections do not leave state prisoners in a chaotic limbo, do not leave state prisoners in a situation where they must spend knowable and unlimited numbers of years of imprisonment soliciting the favor and humoring the impulse, whim, caprice and mood of the correctional staff, and the defendant Procunier asserts that false, biased, prejudicial, and distorted allegations from inmates associates on the outside during parole periods, correctional staff, unqualified medical assistants, and others are not accumulated in prisoners' central files and are not accorded weight impossible to measure or ascertain in the decisions of the Department of Corrections. Defendant Procunier further asserts that plaintiffs have no right under the United States Constitution or under the Constitution of California to discovery of all documents available to the Department of Corrections in reaching decisions with respect to disciplinary infractions, nor any right to confront and cross-examine witnesses against inmates at such hearings, nor any right to be represented by counsel, nor any right to a verbatim transcript of the proceedings. Defendant Procunier further asserts that rules, regulations and procedures regulating the conduct of in-prison disciplinary hearings to comport to the requirements announced by the United States Supreme Court in *Wolff v. McDonnell*, No. 73-679 (June 26, 1974), have been or will promptly be established and followed. Defendant Procunier further asserts that neither the United States Constitution nor the Constitution of California requires procedures in excess of those described in the opinion in *Wolff*, such as is suggested and demanded by plaintiffs

in the text of their complaint. Defendant Procunier further asserts that plaintiffs have a plain, adequate, speedy, and complete remedy at law, to wit, a petition for writ of habeas corpus filed in the federal or state courts of California, to redress any unlawful acts taken by officers or employees of the Department of Corrections which violate plaintiff's rights under the United States Constitution or under the Constitution of California. Defendant Procunier therefore asserts that the declaratory and injunctive relief demanded in the complaint should not be granted because there is no truthful allegation in the complaint upon which to base such a grant of relief and because there is an available and adequate remedy at law.

*Fourth Defense*

With respect to paragraph 2-18, the defendants Kerr, Lynum, Gordon, Bowler, Edman, Hoover, Brown, and Lopez incorporate by reference all prior admissions, denials, and allegations of the First Defense. Said defendants further assert that the procedures followed by the California Adult Authority and by the hearing representatives of the California Adult Authority with respect to the granting, denial, rescinding, suspension and revocations of parole and with respect to the fixing and refixing of terms have and continue to comport to the applicable requirements of the United States Constitution and of the Constitution of California. Said defendants further assert that such decisions and such hearings have been and continue to be made for good cause, have been and continue to be made fairly and impartially in the con-



stitutional sense, and are designed to be and are in fact effective to expose and develop the critical facts upon which the Adult Authority's decisions must be made and to apply such facts the appropriate criteria in order to reach a rational, correct, and fair decision as a matter of law. Said defendants further assert that the decisions reached by the Adult Authority with respect to the above proceedings are neither arbitrary nor discriminatory nor violative of plaintiffs' rights under the United States Constitution or under the Constitution of California. Said defendants further assert that inmates who appear before panels of members or representatives of the Adult Authority are informed as to the material the panel has before it and are not absolutely prohibited from reviewing their central file. Said defendants further assert that California state prisoners are not absolutely prohibited from being represented by retained counsel, or by appointed counsel who may be appointed at the request of an indigent state prisoner, Such appointments and such representation are accorded in accordance with the requirements of *Gagnon v. Scapelli,* 411 U.S. 778 (1973). Said defendants further assert that the time consumed by Adult Authority hearings is appropirate and sufficient under the circumstances of each case and that inmates are generally allowed as much time for their hearings as they feel is appropriate under the circumstances. Said defendants further assert that meaningful discussion is invited in all cases. Said defendants further assert that written statements, as well as oral statements of the reasons for decision and of the evidence relied on, are pro-

vided to California state prisoners. Defendants further assert that Adult Authority members and representatives have expertise and a great deal of experience with respect to the tasks performed by them to which the complaint makes reference, and are not biased and do not base their decisions on false, inaccurate, and misleading information. Said defendants further assert that neither they, nor the hearing representatives, nor the administrative officer of the California Adult Authority have narrow partisan backgrounds, nor do they or any of them possess punitive anti-prisoner biases, nor do the defendants, hearing representatives or administrative officer or any of them adopt rigid and stereo-type thinking patterns pursuant to which they look more for the quality of servility of California state prisoners than for those qualities which would, in fact, portend success on parole. Said defendants further assert that neither they nor the hearing representatives of the Adult Authority nor the Chief Administrative Officer manifest attitudes which militate against a fair and open attitude in accessing parole readiness. Such defendants further assert that the procedures followed by them now and in the past have and continue to comport with applicable requirements of the United States and California Constitutions and that to the extent the conduct of particular proceedings have not or do not follow such requirements plaintiffs have a plain, adequate, complete and speedy remedy at law, to wit, a petition for writ of habeas corpus in the federal or state courts of California. Plaintiffs therefore assert that there is no truthful allegation in the complaint upon which could



be based the plaintiffs' demands for a declaratory judgment or for equitable relief by way of a mandatory injunction.

*Fifth Defense*

The defendant Bowler incorporates by reference all prior admissions, denials, and allegations of paragraph 2 through 18 of the First Defense, and of the Fourth Defense. Defendant Bowler further asserts that on May 31, 1973, he retired from membership in the California Adult Authority and asserts that he is not now a member or employee of the California Adult Authority or of the California Department of Corrections. Defendant Bowler therefore asserts that there is no claim in the complaint upon which relief can be granted against him in any personal or official capacity.

*Sixth Defense*

Defendants assert that they have not denied plaintiffs due process of law and deny that they have committed acts, overt or otherwise, against plaintiffs in violation of the Constitution of the United States or of the California Constitution.

*Seventh Defense*

The complaint fails to state a claim against defendants upon which relief can be granted.

*Eighth Defense*

At the time of the facts alleged in the complaint, applicable federal and state law neither prohibited nor

described as unlawful the conduct alleged, and the complaint fails to allege any unlawful conduct occurring after recent nonretroactive changes in federal and state law applicable to the proceedings of the type to which the complaint makes reference. The complaint therefore fails to raise any substantial question under federal or California state law.

WHEREFORE, defendants pray judgment that plaintiffs prayer for declaratory judgment and for preliminary and permanent injunctive relief be denied and that plaintiffs take nothing by reason of the complaint on file herein.

Dated: July 22, 1974.

Evelle J. Younger, Attorney General

Jack R. Winkler, Chief Assistant
Attorney General—Criminal Division

Edward P. O'Brien
Assistant Attorney General

John T. Murphy
Deputy Attorney General

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General
Attorneys for Defendants.

[Statement of Service Omitted in Printing]



United States Court of Appeals
for the Ninth Circuit

No. 74-2206

[Filed August 8, 1974]

[Caption Omitted in Printing]

SUPPLEMENTAL APPLICATION FOR STAY OF PART OF DISTRICT COURT'S ORDER

Petitioners, defendants below, respectfully request that, pending disposition of the petition for writ of mandamus, the district court's discovery order be stayed insofar as it requires petitioners to furnish respondents (plaintiffs below) the personnel files, and internal governmental notes, memoranda, correspondence, etc., demanded in Items Nos. 7, 14, 15, 18, 20 21, and 22 of respondents' (plaintiffs' below) "Request for Production of Documents" (Petition for Mandate, Exhibit B).

The district judge denied petitioners' request for stay of the compelled disclosure of the personnel files demanded in Item No. 7 of the respondents' request for production of documents (Petition for Writ of Mandamus, Exhibit E, p. 2, line 31-page 3, line 4).

Petitioners have not applied to the district court for a stay of the compelled disclosure of the documents demanded in Items Nos. 14, 15, 18, 20, 21 and 22 of respondents' (plaintiffs below) request for production of documents (Petition for Mandamus, Exhibit B) because it was fruitless and impractical to do

so in light of the district judge's denial of our application for stay of the more onerous compelled disclosure of the personnel files. Furthermore, the district judge rejected petitioner's request for relief by an in-camera inspection of the documents demanded in these requests.

Petitioners requested this relief below in the alternative to our objections to furnishing the documents demanded in the above items of the request for production of documents. Attached hereto as Exhibit G is "Defendants' Response to Plaintiffs' Request for Production of Documents." Attached hereto as Exhibit H is defendants' "Opposition to Plaintiffs' Motion to Compel Answers to Interrogatories and Production of Documents." Attached hereto as Exhibit I is defendants' "Notice of Intent to Seek Review of Magistrate's Decision and Statement of Objections." Attached hereto as Exhibit J is defendants' "Request for Review of the Magistrate's Findings and Recommendations." In each of these documents defendants urged in the alternative that production of the items demanded in Requests Nos. 7, 14, 15, 18, 20, 21 and 22 be compelled only after an in-camera inspection. These requests for relief were rejected by the magistrate who recommended that the request for production of documents "be granted as to each and every item" (Petition for Mandamus, Exhibit C, p. 2, lines 15-18) and by the district judge who affirmed this recommendation and adopted and rendered it as the decision and order of the court (Petition for Mandamus, Exhibit E, p. 1, line 31-p. 2, line 3).



Petitioners' request that the above portions of the district court's order be stayed because it appears that the Petition for Writ of Mandamus will not be disposed of prior to the time within which petitioners must otherwise furnish the documents requested, and because the harm which will be done by compelled disclosure of the documents in advance of disposition of the petition for writ of mandamus could not be undone on the review which would be subsequently afforded on the petition. Discovery in the case below is scheduled to close on August 15, 1974, and the time within which defendants may comply with the district court's order for discovery has been extended by mutual stipulation among respective counsel to August 14, 1974. A copy of the district court's "Order for Times of Compliance with Certain Local Rules of Court," is attached hereto as Exhibit K and sets forth in Item No. 1 the scheduled date for completion of all discovery.

### *Conclusion*

For the above reasons, petitioners respectfully request that the district court's order be stayed pending disposition of the petition for writ of mandamus insofar as the district court's order would compel disclosure of the documents and items demanded in Requests Nos. 7, 14, 15, 18, 20, 21 and 22 of respondents' (plaintiffs' below) "Request for Production of Documents," dated June 19, 1973, and attached as Exhibit B to the petition for writ of mandamus. A proposed order to this effect is attached hereto. Also attached is a proposed order requiring respondents' to

answer the petition for writ of mandamus. Loose duplicates of these two orders are also being furnished the court.

Dated: August 8, 1974

Evelle J. Younger, Attorney General
of the State of California

Jack R. Winkler, Chief Assistant
Attorney General—Criminal Division

Edward P. O'Brien
Assistant Attorney General

John T. Murphy
Deputy Attorney General

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General

Attorneys for Petitioners

KSM:pm

[Statement of Service Omitted in Printing]

[Proposed Orders Omitted in Printing]

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[Exhibit G]

[The text of Exhibit G, Defendants' Response to Plaintiffs Request For Production of Documents, filed in the district court on November 30, 1973, has heretofore been printed in this appendix and appears at page 57 above.]



[Exhibit H]

[The text of Exhibit H, Defendants' Opposition To Plaintiffs' Motion To Compel Answers To Interrogatories And Production Of Documents, filed in the district court on March 25, 1974, has heretofore been printed in this appendix and appears at page 147 above.]

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[Exhibit I]

[The text of Exhibit I, defendants Notice of Intent To Seek Review Of Magistrate's Decision And Statement Of Objections, filed in the district court on April 30, 1974, has heretofore been printed in this appendix and appears at page 217 above.]

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[Exhibit J]

[The text of Exhibit J, defendants Request For Review Of Magistrate's Findings And Recommendations, filed in the district court on May 6, 1974, has heretofore been printed in this Appendix and appears at page 220 above.]

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[Exhibit K Omitted in Printing]

[The text of this order is not printed in this appendix and appears in the printed Petition For Writ Of Certiorari, Appendix, pages xxix-xxxiii.]

United States Court of Appeals
For the Ninth Circuit

No. 74-2206

Henry W. Kerr, et al.,
Petitioners

vs.

United States District Court, Northern District of California,
Respondent

John Van Geldern, Danny Jones, et al.,
Real Parties in Interest

[Filed Aug. 15, 1974]

ORDER

Before: CHAMBERS and WRIGHT, Circuit Judges

On consideration of the petition for writ of mandamus filed herein on June 26, 1974, it is ordered:

1) That the clerk shall serve a copy of this order upon the Hon. Stanley A. Weigel and all parties to the action below. Such service shall be made by mail and service on the parties may be effected by mailing copies to the parties' attorney of record in the district court.

2) Answers to the petition will be filed according to the provisions of Rule 21(b), Fed. R. App. P., and they will be filed on or before August 29, 1974.

3) Petitioners may file, on or before September 4, 1974, a reply to any answers which may be filed.



4) If the court shall require oral argument the time for such argument will be subsequently fixed and the parties notified.

5) That part of the order of the district court requiring production of any documents to which petitioners have raised an objection on the grounds of confidentiality is stayed pending disposition of this petition.

Mo Cal 7/8/74

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In the United States District Court
for the Northern District of California

Civil No. C-72-2088 SAW

John Van Geldern, et al.,
Plaintiffs,

vs.

Henry W. Kerr, et al.,
Defendants.

[Filed August 1, 1974]

ORDER DETERMINING THAT ACTION IS MAINTAINABLE AS A CLASS ACTION

Defendants' motion for an order determining whether the above-captioned case may be maintained as a class action under Rule 23, Federal Rules of Civil Procedure, having come on regularly for hearing

on July 11, 1974, and it appearing to the Court that the requirements of Rule 23 (b)(2) have been satisfied, and good cause appearing therefor,

It is hereby ORDERED that the above-captioned case shall (subject to any further order of the Court) henceforth be maintained as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of all adult male felons who now are, as well as all adult male felons who in the future will be, in the custody of the California Department of Corrections, whether confined in an institution operated by the Department or on parole.

Dated: August 1, 1974.

/s/ Stanley A. Weigel
Stanley A. Weigel
United States District Judge



United States Court of Appeals
for the Ninth Circuit

No. 74-2206

[Title Page, Table of Contents, Table of Authorities, Caption Omitted in Printing]

[Filed August 30, 1974]

RESPONDENTS' ANSWER TO PETITION FOR WRIT OF MANDAMUS

Those respondents who are the plaintiffs in the District Court, and who are the real parties in interest with respect to the instant petition for a writ of mandamus (hereinafter the "petition"), submit the following answer in response to the order of this Court, filed August 15, 1974.

*Statement of the Case*

This class action, brought by seven named plaintiffs (respondents herein) on behalf of all California prisoners and parolees,[1] attacks on constitutional grounds the competency, bias, and composition of, and the procedures followed by, the California Adult Authority in fixing terms and in granting, rescinding and revoking paroles. Plaintiffs and their class contend that the various components of the present sys-

[1]On August 1, 1974, the District Court entered an order that the action is to be maintained as a class action under Rule 23(b)(2), F.R. Civ.P., on behalf of "all adult male felons who now are, as well as all adult male felons who in the future will be, in the custody of the California Department of Corrections, whether confined in an institution operated by the Department or on parole." Defendants in the District Court—who are the petitioners herein—are the members of the Adult Authority and the Director of the Department of Corrections.

tem—which permit defendant members (and hearing representatives) of the Adult Authority to exercise virtually unlimited discretion over the lengths of terms of prisoners sentenced under the indeterminate sentence law—violates the Sixth and Fourteenth Amendments to the United States Constitution.[2]

Specifically, plaintiffs have alleged—and must therefore prove at trial—that the members and hearing representatives have no expertise in term-fixing and parole revocation, but instead are entirely unsuited to their positions because of their narrow, law

[2]In California, a trial judge may not set any specific term of imprisonment; instead, he is required (if imprisonment is to be imposed at all) to sentence the defendant to the term prescribed by law. See California Penal Code § 1168. Most crimes in California carry minimum and maximum terms of great disparity, e.g., one year to life for molestation of a minor (§ 288), and one to 25 years for kidnapping (§ 208). After he is eligible for release on parole (usually after serving 1/3 of his minimum sentence), a prisoner appears annually before a panel of two members or hearing representatives of the Adult Authority, which either (i) fixes the prisoner's term, and at the same time grants parole, *or* (ii) refuses to fix the term and instead schedules the prisoner for another hearing one year later. If a prisoner's term is never fixed (and parole never granted) by the Adult Authority, the prisoner must serve the maximum term. After a term has been fixed and parole granted, but before actual release on parole, a parole date may be rescinded by the Authority; and after release on parole, an inmate's parole may be revoked. In either case, the inmate's sentence is automatically "refixed" *at the maximum term* and the inmate is again remitted to annual hearings before members or hearing representatives in order to get his term fixed and to obtain a new parole release date. Adult Authority *members*, who are defendants herein, are nine in number and are appointed by the Governor, whereas *hearing representatives* hold Civil Service appointments, which are made by the Chairman of the Adult Authority. Both, however, perform essentially the same function so far as conducting hearings are concerned and, although decisions of the hearing representatives must be formally "approved" by two members, respondents expect to show at trial that approval is so routine that decisions by hearing representatives have virtually the same effect as decisions by members.



enforcement backgrounds, their anti-prisoner biases, and their stereotypical thought patterns (*Complaint*, ¶ 16a); that the written materials upon which they rely heavily are, to a significant degree, false and/or unreliable, are placed in a prisoner's central file through a procedure lacking any safeguards, and may not be viewed by the prisoner himself or by his attorney (*id.*, ¶ 16c); that the hearings themselves are fatally defective because (i) the panel members have insufficient time, (ii) the prisoner is unable, without counsel, to adequately represent himself, and (iii) inconsistent standards are applied from year to year and from member to member (*id.*, ¶ 16d, e, f); and that the decisions reached by the Adult Authority are arbitrary and discriminatory and result in the continuing imprisonment of "literally thousands of inmates who should not be imprisoned by any rational criteria" (*id.*, ¶ 16g, j). In short, respondents claim, *inter alia*, that the Adult Authority hearings "are constitutionally infirm because they are not designed to be nor are they effective to expose and develop the critical facts upon which * * * decisions must be made, or to apply to such facts the appropriate criteria in order to reach a rational and correct decision as a matter of law" (*id.*, ¶ 2e). Accordingly, respondents seek declaratory and injunctive relief requiring that certain specific procedural safeguards attend those hearings at which terms may be fixed and parole may be granted, rescinded, or revoked (*id.*, pp. 31-33).[2a]

[2a]In their petition for a writ of mandamus, petitioners erroneously suggest that most rights sought by respondents in this case

After a host of preliminary motions filed by defendants—seeking to terminate the case at an early stage—were denied by the District Court and by this Court,[3] plaintiffs served upon defendants a set of interrogatories under Rule 33 and a request for production of documents under Rule 34 (see Exhibits B and F to petition). Initially, petitioners simply refused to file answers or objections to these requrests until ordered to do so by the District Court.[4] Thereafter, petitioners filed objections to virtually all of the Rule 34 requests, and to many of the Rule 33 interrogatories as well. The District Court referred respondents' subsequent Rule 37 motion to compel discovery to Magistrate David Urdan who, after a full briefing of the issues and a full hearing thereon, recommended that petitioners produce all of the requested documents; that petitioners answer some but not all of the interrogatories; and that petitioners pay to respondents the sum of $500 purusant to Rule 37(a)(4), requiring a party objecting to discovery without substantial justification therefor to pay the

have already been effected, and "require neither this litigation nor extensive discovery for their establishment or vindication" (Petition at 5 n.2). Respondents have already refuted this claim in a letter to this Court, a copy of which is attached as Exhibit A hereto.

[3]The complaint itself was filed on November 15, 1972. On December 22, 1972, defendants filed a motion to dismiss or to transfer this action, which was denied by the Court on March 8, 1973. Defendants then filed a motion to amend the order of denial to permit an interlocutory appeal under 28 U.S.C. § 1292(b), which the Court denied on April 12, 1973. Defendants then filed, in this Court, a petition for writ of prohibition or mandate, seeking an order which would, in effect, have required this Court to dismiss the case. When that petition was denied on May 10, 1973, defendants petitioned this Court for a rehearing, which was denied on May 30, 1973.

[4]See order of District Court entered on November 15, 1973.



expenses reasonably incurred in obtaining the order to compel. The Magistrate also recommended the entry of a protective order, requiring that

> "no central file of any plaintiff and no personnel file of any member of the Adult Authority, hearing representative, or executive officer shall be shown to any person except counsel for the plaintiffs and those personnel employed in their offices, and then only to the extent necessary to the conduct of this litigation, except as may be permitted by further order of the Court" (see Exhibit C to petition, p. 2).

After another hearing in the District Court, the court modified, and as modified adopted, the order of the Magistrate.

Thus after a year's protracted litigation in the District Court, involving two separate hearings conducted by Magistrate Urdan and by Judge Weigel, petitioners now ask this Court to issue its extraordinary writ of mandamus which would substantially impair, if it would not entirely eviscerate, respondents' ability to obtain evidence which is crucial to the factual development of their case. In this Court petitioners argue that certain documents, admittedly in their custody and control, are either irrelevant or privileged; or that, at the very least, the determination of relevancy and privilege is *required* to be made through an *in camera* inspection of these documents by the District Court.

Respondents, in this answer, will show (1) that the documents involved are in fact highly relevant to the subject matter of the litigation; (2) that petitioners

have failed to lodge a legally sufficient claim of privilege in the District Court, or to make the requisite *showing* that the documents come within the reach of any recognized privilege; (3) that in fact no privilege whatever attaches to these documents; (4) that petitioners have failed to show that an *in camera* review is required; and (5) that this is a particularly inappropriate case for the exercise of this Court's extraordinary mandamus jurisdiction. These issues will be treated *seriatim* in the following pages.

## Argument

### I

### The Documents Requested by Respondents Are Highly Relevant to the Subject Matter of the Litigation Pursuant to Rule 26, Federal Rules of Civil Procedure

Although court decisions on relevancy are by nature "extremely particularistic", 8 Wright & Miller, *Federal Practice and Procedure* (1970 ed.) at 52, the following principles are by now well settled.

1. "Certainly the requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms. No one could suggest that discovery should be allowed of information that has no conceivable bearing on the case. But it is not too strong to say that a request for discovery should be considered relevant if there is any possibility that the information sought may be relevant to the subject matter of the action." 8 Wright & Miller, *supra,* at 45-47, and cases cited; *accord:* 4 Moore's Federal Practice, ¶26.56[1] at 26-177.



2. Under the Federal Rules, it is no ground for objection that information sought in pretrial discovery would not be available at trial, "if the information sought appears reasonably calculated to lead to the discovery of available evidence." Rule 26(b)(1); *Olympic Refining Company v. Carter,* 332 F.2d 260, 266 (9th Cir. 1964). Thus it is well settled "that the question of relevancy is to be more loosely construed at the discovery stage than at the trial." 8 Wright & Miller, *supra,* at 41.

3. In addition to discovering information pertaining to a party's case in chief, it is entirely proper to obtain information for a host of other purposes such as cross-examination of adverse witnesses, *United States v. Meyer,* 398 F.2d 66, 72 (9th Cir. 1968); determining the issues, 8 Wright & Miller, *supra,* at 41-42; and obtaining information concerning an opponent's case, *id.* at 94-95.

4. "If protection is needed, it can better be provided by the discretionary powers of the court under Rule 26(c) than by a constricting concept of relevance." 8 Wright & Miller, *supra,* at 47, and cases cited at n.24. This reference, of course, is to the power of a District Court to fashion an effective protective order to minimize or eliminate whatever harm might otherwise occur from disclosure of sensitive or confidential material.

The documents whose production petitioners have resisted in this Court are (1) the personnel files of defendant Adult Authority members (respondents' Request No. 7); (2) reports submitted by Adult

Authority members and hearing representatives (*id.*, No. 14); (3) written statements by members or hearing representatives taking a position on Federal or State legislation (*id.*, No. 15); (4) written proposals for changing various aspects of the Adult Authority (*id.*, No. 18); (5) memoranda written by defendant Henry Kerr, who at the time the complaint was filed was Chairman of the Adult Authority (*id.*, No. 20); (6) documents which pertain to Adult Authority Policy Statements or Resolutions (*id.*, No. 21); and (7) documents which concern the Adult Authority's adoption of new policies, procedures and criteria (*id.*, No. 22) (see respondents' request for production of documents, appended as Exhibit B to the petition). Pursuant to a limitation imposed by the Magistrate and adopted by the District Court, each of these documents is to be provided only for the period of time from January 1, 1970, to the present.

In their petition to this Court, petitioners appear to be most concerned about disclosing their personnel files; yet it is difficult to imagine a document which would be more relevant for purposes of this litigation. In petitioners' view, the nature and scope of procedural due process which must be extended to prisoners and parolees are entirely unrelated to any personnel data concerning the decision-maker, and seek to identify Adult Authority members and hearing representatives with State and Federal judges.[5] Yet the

[5]However, the United States Supreme Court has often pointed out that due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In the case at bar, one of the most obvious and crucial factors for the District Court to consider is the identify and qualifications of the Adult Authority members and hearing representatives who wield the virtually unlimited power described in this section of respondents' answer.



difference between the clearly delineated and severely limited power given to members of the judiciary, on the one hand, and the virtually unlimited discretion given to members of the Adult Authority, on the other, is staggering. Judges, who all have considerable legal training, are bound by strict rules of procedure and evidence, not of their own making; mediate between opposing parties represented by competent counsel; function in open court, with all exchanges on the record; are limited to imposing (in criminal cases) a prison sentence "prescribed by law"; and are subject to judicial review of all significant actions. By contrast, Adult Authority members and hearing representatives, most of whom have no legal training whatever (but instead are ex-law enforcement or ex-correctional officers), make up their own rules, and in doing so are not even subject to the California Administrative Procedure Act;[6] no counsel are permitted at the hearings which they conduct; members

[6]In *American Friends Service Committee v. Procunier*, 33 Cal. App. 3d 252 (1973), the court held that neither the Department of Corrections nor the Adult Authority is required to adopt *or* promulgate its rules or regulations in accordance with the Calif. APA. Thus the so-called Resolutions and Policy Statements, which govern the Adult Authority, are adopted, modified, and revoked by a majority vote of each body for any reason or no reason at all (deposition of defendant Kerr by B. E. Bergesen III in *Van Geldern v. Kerr*, January 22, 1973, at pps. 2-7). And *no* rules of evidence *or* procedure govern the hearings at which members and representatives grant, rescind and revoke paroles. (Deposition of Walter A. Gordon, Jr., by Sidney Wolinsky in *Van Geldern v. Kerr*, June 14, 1974, at p. 20; deposition of Ray Brown by Sidney Wolinsky in *Van Geldern v. Kerr*, June 11, 1974, at p. 21.

and representatives have the power to make many inmates serve an entire lifetime in prison; no transcripts are made of these proceedings, which are for the most part held entirely in secret; and there is no effective method of judicial or any other type of review. These powers—unknown to any other area of the law—have been termed by one commentator as "the most important anomaly in California criminal procedure." Johnson, "Multiple Punishment and Consecutive Sentences: Reflection on the *Neal* Doctrine," 58 Cal. Rev. 357, 390 (1970). Yet they have often been defended on the ground that, *inter alia,* Adult Authority members and hearing representatives possess unusual "expertise" in making the type of parole decisions which are at issue in the case at bar.[7]

Under these circumstances, it makes no sense whatever to compare Adult Authority members and representatives to judges, or even to other governmental decision-makers, since no other decision-makers possess such unlimited and unbridled discretion.[8] For the

[7]"[T]he whole concept for the indeterminate sentence rested on the assumption that persons sentenced to prison would be examined by a board of "experts" who would have the skills as well as the total discretion to decide when, if ever, to release prisoners from the one day to life sentences that they were serving . . . today the completely indeterminate sentence idea is rarely in use and has few supporters among professionals in correctional administration. In part, I suppose, this is because there are in fact no "experts" really skillful or confident enough to claim or exercise such limitless discretion." Johnson, "The Responsibility of a Parole Board to Change its Own Role", *Corrections in Context: The Criminal Justice System and the Corrective Function,* ed. Doris Grotewohl Baker, University of Wisconsin Extension Center for Continuing Education and Community Action for Social Service, 1972; see Cal. Pen. Code § 5075 (West 1970).

[8]Thus one court has noted that the "discretion lodged in the Authority is so broad that it is seldom that a case can be made out that would show an abuse of that discretion." *Azeria v. California Adult Authority,* 193 Cal.App. 2d 1, 5, 13 Cal. Rptr. 839, 842 (1961).



same reasons, it is a manifestly crucial part of respondents' case to show that *in fact* members and representatives have no such "expertise" but, to the contrary, are indeed—as the complaint alleges—extremely unsuited to their task. All of these allegations have been expressly denied by petitioners in the Fourth Defense contained in their answer (see note 7, *supra*), and are therefore properly at issue in the District Court. Therefore, whatever else may be said about the personnel files of the members and hearing representatives, it cannot be said that they are irrelevant to the subject matter of the litigation (Rule 26, F.R. Civ. P.); *or* that they are not reasonably calculated *to lead to* admissible evidence (*ibid.*); *or* that they would not be "particularly important to preparation for effective cross-examination of * * * [adverse] witnesses." *United States v. Meyer,* 398 F.2d 66, 72 (9th Cir. 1968).[9]

Similarly, a vitally important source of evidence with respect to the procedures and criteria followed by, and the sort of results reached by, the Adult Authority members and hearing representatives is furnished by the other six types of documents requested by respondents and put in issue by petitioners' man-

[9]A striking example of the potential use of such documents for purposes of impeachment may be found at page 13 of Exhibit D to the petition, where respondents compare a document which petitioners did produce (after first objecting to its relevancy) with the conflicting testimony given by defendant Kerr, former Chairman of the Adult Authority, during a deposition taken by respondents in this case. The document itself is attached as Exhibit "B" to this answer.

damus petition. Since the most important function of the Adult Authority—indeed its entire reason for being—is to conduct the various types of parole hearings, it is highly likely that the memoranda and other documents requested by plaintiffs would either be admissible as evidence at trial or are reasonably calculated to lead to such evidence. For example, proposals for change in specific aspects of the Adult Authority (Request No. 18) or statements by members or representatives to legislative bodies (Request No. 15) by their very nature must speak to shortcomings in Adult Authority procedures by the very persons who are closest to the system and most knowledgeable about its operation. Furthermore, it is undisputed that during the past few years the percentage of paroles granted by the Adult Authority has dropped markedly, from approximately 50% in 1971 to approximately 19% in 1973. "Release Dates Granted or Denied", Department of Corrections, January 21, 1974. It is respondents' position that this drop is mainly attributable to (1) political pressure from the Governor's office and from other political figures and (2) a consequent "get tough" policy adopted by the Adult Authority in its Policy Statement No. 24 and Resolution No. 129. (Deposition of Charles Brown by Sidney Wolinsky in *Van Geldern v. Kerr,* June 14, 1974, at pp. 30-31; deposition of Dan Lopez by Sidney Wolinsky in *Van Geldern v. Kerr,* June 20, 1974, at pp. 27-29). Therefore respondents' request for all documents surrounding these and other Resolutions and Policy Statements (Requests No. 21 and 22) are manifestly relevant within the meaning of Rule 26.



Similarly, documents and reports submitted by Adult Authority members (Request No. 14) and memoranda written by the immediate past Chairman (Request No. 20) are likely to support, refute or in some way illuminate the allegations in the complaint. Surely some of these documents must criticize the system or identify areas of needed improvement, and all such items are likely to constitute (or lead to) evidence which would be admissible as tending to support *or refute* the allegations in the complaint. Obvious examples would be complaints from members or hearing representatives (i) that they do not have sufficient time to do a thorough job (deposition of Lee Edman by Sidney Wolinsky in *Van Geldern v. Kerr,* June 10, 1974, at p. 12; deposition of Charles Brown by Sidney Wolinsky in *Van Geldern v. Kerr,* June 14, 1974, at p. 20.), or (ii) that the psychiatric reports which they receive are unreliable, (deposition of Dan Lopez by Sidney Wolinsky in *Van Geldern v. Kerr,* June 20, 1974, at p. 57), or (iii) that some inmates are incapable of representing themselves (deposition of Lee Edman by Sidney Wolinsky in *Van Geldern v. Kerr,* June 10, 1974, at p. 15), or (iv) insufficient or inadequate reports are being received from counselors (deposition of Ray Brown by Sidney Wolinsky in *Van Geldern v. Kerr,* June 11, 1974, at p. 17; deposition of Walter A. Gordon, Jr., by Sidney Wolinsky in *Van Geldern v. Kerr,* June 14, 1974, at p. 12-13). Other documents are likely to propose changes in procedures (e.g., to allow counsel at hearings) and to document why such changes would or would not be economically or administratively fea-

sible. Still other documents may discuss the Adult Authority's experience in adopting various due process safeguards—and in affording counsel in some cases—following recent United States Supreme Court decisions.[10] In each instance there is no need for respondents to belabor the obvious: such documents would be manifestly relevant to the subject matter of the case at bar, within the meaning of Rule 26.

An excellent example of such a memorandum, appended as Exhibit B to this answer, was written by Mr. Robert Doran, formerly the chief classification officer of the Department of Corrections (hereinafter referred to as the "Doran memorandum"). In their complaint, respondents allege that

> "[i]n appearing before an Adult Authority Panel, many inmates are so fearful, tongue-tied or lacking in the ability to organize and articulate their position that they are unable to make an effective presentation of their case, or even on occasion to respond accurately to questions posed by the panel" (*Complaint,* ¶ 16d; see Exhibit A to petition at 27-28).

The Doran memorandum states, in pertinent part:

> "Some inmates become tongue-tied or emotionally involved, and during the course of the interview, forget what they really desire to discuss with the Board."

Yet in their response in the District Court, petitioners could and did state that they "object to the production

[10]See, e.g., *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973).



of this inter-agency memoranda and questions its relevancy to the subject matter of the instant litigation." Thus respondents have every reason to believe that the other types of documents here under consideration, as to which relevancy objections have been interposed by petitioners, will yield similar evidence; and that petitioners' relevancy objections with respect to such documents are as specious as they were with respect to the Doran memorandum.

In the District Court the Magistrate and the District Judge each held a hearing and carefully considered petitioners' arguments based on relevance. Their determination that the documents are relevant should not be set aside by this Court in the absence of a clear abuse of their discretion. Surely no such abuse appears on the face of this record, which in fact demonstrates that the documents in question are highly relevant on several different grounds.

## II

## In the District Court, Petitioners Neither Submitted a Legally Sufficient Claim of Privilege Nor Attempted a Showing That Any Documents Requested by Respondents Are in Fact Privileged

Entirely apart from whether any particular document is or is not privileged, there is a threshold question whether a party claiming a privilege has (1) properly *claimed* the privilege and (2) made the required *showing* that the document involved comes within the reach of the privilege invoked. In the Dis-

trict Court, petitioners did neither, and therefore this case is a peculiarly inappropriate one in which to consider—on a petition for a writ of mandate—the question of privilege.

It is well settled that in order to invoke an applicable privilege "[t]here must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds,* 345 U.S. 1, 7-8 (1953). This requirement applies equally to claims of governmental privilege asserted by a state official, *Carr v. Monroe Mfg. Co.,* 431 F.2d 384, 387 (5th Cir. 1970).[10a] The rule has been recognized by this Court which, in holding that a claim of privilege must be formally invoked, has stated that it is insufficient for a party to claim that a document is *"subject to* a claim of executive privilege." *General Services Administration v. Benson,* 315 F.2d 878, 879 (9th Cir. 1969) (emphasis added). See also *Thill Securities Corp. v. New York Stock Exchange,* 57 F.R.D. 133, 138 (E.D. Wisc. 1972).[11] Yet this Court wili search the record in vain for any such claim of privilege, which was never lodged in the Dis-

[10a]See also California Evidence Code § 1040, establishing a privilege for official information "*if* the privilege is claimed by a person authorized by the public entity to do so."

[11]"To the best of my knowledge, executive privilege has always been asserted by the head of the agency claiming the privilege, and such claim has specified with particularity the material which the executive feels is privileged." *Thill Securities Corp. v. New York Stock Exchange, supra,* 57 F.R.D. at 138, and cases cited therein. However, an examination of petitioners' submissions in the District Court (see Exhibits G, H, I and J to their petition in this Court) nowhere specifies with any particularity the material which the Attorney General believes to be privileged.



trict Court by either the Chairman of the Adult Authority or by the Director of the Department of Corrections.

Of even greater importance, petitioners did not even *attempt,* in the District Court, to carry their burden of *showing* that any of the documents requested by respondents came within any recognized privilege. *See, e.g., Rogers v. Tri-State Materials Corporation,* 51 F.R.D. 234, 247 (N.D. W.Va. 1970); Advisory Committee's Note to 1970 Amendment to Rule 33(a), 48 F.R.D. at 523; 8 Wright & Miller, *supra,* at 542-43. Such a showing, the courts have often said, "must be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel." *Apco Oil Corp. v. Certified Transp., Inc.,* 46 F.R.D. 428, 432 (W.D. Mo. 1969). Thus courts "have insisted on a particular and specific demonstration of facts, as distinguished from stereotyped and conclusory statements." 8 Wright & Miller, *supra,* at 265. See also *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 101 (W.D. Mo. 1973); *Honeywell Inc. v. Piper Aircraft Corp.,* 50 F.R.D. 117, 120 (M.D. Pa. 1970).

However, what the District Court had before it was no more than the "unsupported contentions and conclusions of counsel." For example, petitioners now seek to invoke privileges purportedly conferred by California Government Code §§ 6254(a) and (f),[12]

[12]Although petitioners refer to Section 6454(a) and 6542(f) of the California Government Code (see petition at 20, 21), it is apparent that they mean to refer to subsections (a) and (f) of Section 6254, as they did in the District Court.

yet nowhere did they show that the documents involved "are not retained by the public agency in the ordinary course of business", *or* that "the public interest in withholding such records clearly outweighs the public interest in disclosure", *or* that the documents are "[r]ecords of complaints to or investigations conducted by" a state agency for correctional purposes. See California Government Code § 6254 (a) and (f). And, so far as California Evidence Code § 1040 may be involved, petitioners made no attempt whatever to show that any particular document was "acquired in confidence by a public official in the course of his duty", or that "disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice." See California Evidence Code § 1040. Instead, there is simply a bald claim by the Attorney General to the effect that "the Adult Authority asserts the privilege against disclosure conferred by California Evidence Code Section 1040 (b)(1)" (Response No. 14; see Exhibit G to petition at 7-8). Indeed, there are even some instances when petitioners' purported assertion of a privilege was fudged by objecting "[t]o the extent this request *may* seek material privileged by California Government Code 6254(a)" (Response No. 2; Exhibit G at 3) (emphasis supplied). For this reason alone, it cannot be said that the District Court abused its discretion in refusing to recognize the privileges asserted by the Attorney General.



## III

## The Documents Involved in the Instant Petition Are Not Privileged

In their petition to this Court, petitioners do not appear to press their claim of privilege with any real force (see pages 19-21). Yet in two places they do allude to a privilege assertedly "recognized" or "conferred" by California Government Code § 6254(a) and (f). Curiously, no mention is made, except in another context, of California Evidence Code § 1040 (see petition at 21 n.5).

There are, however, two separate reasons why no privilege attaches to these documents. *First,* the jurisdiction of the District Court in this case is based upon the constitutional rights which respondents seek to vindicate under 42 U.S.C. § 1983, in which case Federal courts are not bound by state privileges; and there is no applicable Federal privilege. *Second,* there is no privilege created by the law of California which applies to these documents. Therefore, no matter which standard this Court might apply, the documents are subject to discovery under Rules 26 and 34 of the Federal Rules of Civil Procedure.

### A. *In Federal Question Cases, State Created Privileges Are Not Conclusive*

In any analysis of whether documents are privileged within the meaning of Rule 26, there stands the threshold question of whether jurisdiction for the suit itself is predicated upon Federal or State law. "When the litigation involves rights and duties that the state

law has created, it is appropriate that the states, rather than the Federal court, should have the last word on the comparative importance of the relation as against the interest in arriving at the truth in the lawsuits." 8 Wright & Miller, supra, § 2016 at 124. Thus the rule has emerged that in diversity cases the Federal courts will generally apply the privileges contained in the law of the state in which the court sits, *ibid.*, although even in diversity litigation "an important federal policy might yield a contrary result in some cases." 4 Moore's Federal Practice, ¶26.60[7] at 26-260. See also *Baylor v. Mading-Dugan Drug Co.*, 16 F.R.Serv.2d 1183 (N.D. Ill. 1972).

Where, however, jurisdiction is grounded upon a Federal statutory or constitutional right, the law is otherwise. "In cases arising under the Federal law it is abundantly clear that there is no constitutional inhibition to abrogation of state-created privileges, either in connection with the admission of evidence or in connection with pre-trial discovery." 4 Moore's Federal Practice, *supra,* ¶26.60[7]. Professor Wright agrees, stating that "[a]s a matter of policy, it seems appropriate that states should not be permitted to say when the Federal courts must refrain from hearing useful testimony in a matter involving Federal law." 8 Wright & Miller, *supra,* § 2408 at 333-34.[13]

[13]Finally, the Court's attention is invited to the proposed Federal Rules of Evidence, which provide that state-created privileges will not apply even in diversity cases. See 51 F.R.D. 356-83 ( ). Moreover, there is no privilege contained in those rules that would extend to the documents involved in the case at bar. *Compare* proposed Rules 501-510. Thus the drafters of the new Evidence Code have decisively rejected the sort of widespread privilege for government documents here claimed by defendants.



In recent years several Federal courts have adopted the position urged by Professors Moore and Wright. In *Garner v. Wolfinbarger,* 430 F.2d 1093 (5th Cir. 1970), a state-created attorney-client privilege was asserted in an action brought by stockholders against their corporation under the Securities Acts of 1933 and 1934. Although the District Court treated the Alabama law of privilege as controlling, the Fifth Circuit rejected that approach on the ground that the case was grounded on Federal rather than state law.

> "This is a federal question case (with ancillary state aspects) rather than a diversity case. Such actions are predicated on federal law, embodying federal policies. Enforcement of those policies demands that the federal courts apply their own rules of privilege where substantial state interests are not infringed * * * We find nothing in either Rule 43(a) or the Rules of Decision Act to prevent a federal court from independently weighing the competing interests in any federal question case." *Id.* at 1098-99.

The approach then adopted by the court in *Garner* was to order a "balancing of interests between injuries resulting from disclosure and the benefit gained in the correct disposal of the litigation", *id.* at 1101, and to remand the case for further proceedings.[13a]

Similarly, in *Carr v. Monroe Mfg. Co.,* 431 F.2d 384 (5th Cir. 1970), the defendants resisted discovery on the basis of a Mississippi statute which in their view created an absolute privilege against the disclo-

[13a]For a discussion of how a balance should be struck between the competing considerations in the case at bar, see pps. 33-36, *infra.*

sure of employment records by a state agency. The court, however, declined to construe the statute in question to determine whether or not it afforded an absolute privilege, and instead reaffirmed the position taken in *Garner v. Wolfinbarger, supra,* that "in any given instance the special federal interest in seeking the truth in a federal question case may require disclosure despite the existence of a state rule holding the same communications privileged." *Id.* at 388. The court explained its approach in the following language:

> "The granting or withholding of any privilege requires a balancing of competing policies, 8 Wigmore, § 2285 at 527-28. The claim of governmental privilege is no exception; in fact, the potential for misuse of government privilege, and the consequent diminution of information about government available to the public, is one more factor which strongly suggests the need for judicial aribtration of the availability of the privilege. That the need for discovery of communications with a state governmental agency arises in a federal case in no way diminishes the need for an independent weighing by the court of the policies behind the privilege." *Ibid.*

Thus the court proceeded to balance "the potential harm from disclosure of any communication subject to a privilege" against "the benefits of disclosure." *Id.* at 390. Noting that the purpose of the action was to eradicate racial discrimination in employment, the court found that "the reasons favoring disclosure are especially compelling in the light of the nature of the case." *Ibid.*



> "The potential harm from disclosure of any communication subject to a privilege must be weighed against the benefits of disclosure. The possibility of harm to an administrative program and the invasion of privacy of persons who seek employment cannot be ignored. But in nearly every case involving similar state statutes, *supra,* n.3, the balance has been struck in favor of disclosure in court proceedings." *Ibid.*

The court also noted in passing, as had the court in *Garner,* that the District Court could consider the possibility of entering protective orders to ameliorate or eliminate any potential harm which might result from the discovery itself. *Ibid.*

In *Baylor v. Mading-Dugan Drug Co.,* 16 F.R. Serv.2d 1183 (N.D. Ill. 1972), the court observed that in diversity cases "the litigation is based on a state created right in which there is no justification for federal interference with the state's decision that a specific relationship is more important than the litigation." *Id.* at 1184. However, it also noted that "federal courts have refused to honor state privileges in actions involving enforcement of rights created under federal law", *id.* at 1184, and cases cited at n.5, since "[i]n federal question cases there may be compelling reasons for ignoring a state privilege statute and following an independent federal rules," *ibid.* Accordingly, the court concluded "that the Illinois accountant privilege is not applicable in Federal question cases." *Id.* at 1186. See also *Fears v. Burris Mfg. Co.,* 436 F.2d 1357 (5th Cir. 1971); *Fraser v. United States,*

145 F.2d 139 (6th Cir. 1944); *Wood v. Brier,* 54 F.R.D. 7 (E.D. Wisc. 1972).

The decision of this Court in *Baird v. Koerner,* 297 F.2d 623 (9th Cir. 1960), which was cited by petitioners to the District Court on only one occasion, and then only in passing, is not to the contrary.[14] *First, Baird* is a tax case which does *not* involve the necessity to reconcile a plaintiff's *constitutional* rights with a state-created privilege. *Cf. Wood v. Brier,* 54 F.R.D. 7, 10-11 (E.D. Wisc. 1972) ("thus, it is of special import that suits brought under this statute [i.e. § 1983] be resolved by a determination of the truth rather than by determination that the truth shall remain hidden"). *Second,* this Court in *Baird* did in fact make a detailed analysis of the competing considerations of privilege versus disclosure in the attorney-client area—and on the basis of seven separate factors (*id.* at 623) upheld the privilege. Thus the Court conducted the very balancing of competing interests which, in the case at bar, clearly favors respondents (see pps. 33-36, infra.).[15] *Third,* the attorney-client privilege, which was involved in *Baird,* was recognized by the common law and is of ancient origin. *Id.* at 629. By contrast, the sort of "governmental privilege" which petitioners seek to invoke in

[14]The only apparent reference to the *Baird* case which was made in the District Court by petitioners is found in Exhibit G to the petition at 14.

[15]"We note the court's language in *Baird v. Koerner* that the attorney-client privilege 'must be assessed on a case to case basis, depending on the particular facts of each case', 279 F.2d at 631, quoting Wigmore for the proposition that the policy of full disclosure must always be taken into account." *Garner v. Wolfinbarger,* 430 F.2d 1093, 1099 n.14 (5th Cir. 1970).



the case at bar is of recent origin, and is statutorily created, and therefore entitled to less weight than one recognized at common law. *Compare Carr v. Monroe Mfg. Co., supra,* 431 F.2d at 389 *with Baird v. Koerner, supra,* 279 F.2d at 629. Accordingly, Baird does not conflict with respondents' position that the District Court need not be bound, in a Federal question case, by the state law of privilege. We turn, therefore, to an inquiry into whether there is a Federal privilege which applies to the documents in question.

### B. *The Federal Public Information Act Does Not Create a Judicial Privilege*

In a passing reference in their petition in this Court, petitioners allude to "the privilege recognized in Title 5, United States Code, Section 552(b)(7)" (petition at 21). Thus in this Court, as in the District Court (see Exhibit G at 13) defendants imply that the Federal Public Information Act (5 U.S.C. § 550 *et seq.*) creates a privilege which authorizes nondisclosure of the documents in question. This argument has, however, been explicitly rejected by courts and commentators alike.

In the words of Professor Moore "the Public Information Act of 1966 . . . creates no privilege." 4 Moore's Federal Practice, ¶ 26.61 [4.-2]. The whole purpose of the Act, of course, was to *expand* the access of the public to official records, *i.e.* to make "information in the files and the agencies, subject to certain specified exceptions, available to the mass

media and *to the public generally.* 5 U.S.C. § 522." Advisory Committee's Note to Proposed Rule 509, Federal Rules of Evidence (emphasis supplied). The exceptions to this broad grant of indiscriminate public inspection were designed to withhold certain types of information *from members of the public generally,* who are seeking to inspect official documents for any reason or for no reason at all; they were not designed to withhold them *from litigants,* who seek documents which are relevant to litigation being conducted in the Federal Courts. Accordingly, "[t]he exceptions in the Act are not framed in terms of evidentiary privilege, thus recognizing by clear implication that the needs of litigants may stand on a somewhat different footing from those of the public generally." *Ibid.*[16]

Court decisions also adopt this view. As it was recently articulated and rejected by one court, petitioners' claim assumes

> "that information exempt from *disclosure to the general public* under the Act, by that fact alone, is 'privileged' within the meaning of F.R.Civ.P. 26(b)(1), and thus not discoverable by a civil litigant. We find that assumption to be unsound." *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 99 (W.D. Mo. 1973) (emphasis supplied).

[16]"it must be remembered, however, that the Public Information Act deals with what is *public* information, that is to say information that must be supplied to any member of the public independent of need. The proposed evidence code deals, instead, with production of information at the behest of litigants whose vindication of private rights may depend upon its production. Further, discovery under the Rules is limited to information that is relevant to the subject matter of the pending action, a limitation that insures that the discovery is reasonably calculated to lead to evidence or other information needed in the adequate preparation of the case. In this context a much more narrow concept of privilege is required." 4 Moore's Federal Practice, ¶ 26.61 [5.–1] at 26-289, discussing the proposed Rules of Evidence. Professor Moore might have added that, in addition to the limitations of need and relevancy imposed by the Federal Rules, any harm resulting from disclosure can be largely eliminated, as it has been in the case at bar, by the entry of a protective order.



Another court rejected an objection to discovery based upon the Act—identical to the one suggested by petitioners in the case at bar—on the ground that "the Act's limitations concerning investigatory files do not apply to a party litigant who might be awarded access to the files by a court, without reliance upon the Act." *Hodgson v. General Motors Acceptance Corporation,* 54 F.R.D. 445, 446 (S.D. Fla. 1972). Yet a third court explained that the

> "Freedom of Information Act was enacted to provide the public with the right to obtain information from administrative agencies and agencies in the executive branch of the government; it was not enacted to provide discovery procedures for obtaining information during litigation. Put otherwise, the fact that § 522(b) of the Information Act provides specified exemptions from the Act's public information requirements does not in and of itself create a judicial discovery privilege with respect to such exemptions. * * * Clearly, the defendant cannot use an administrative exemption which specifically does not cover judicial discovery as a basis for claiming a judicial discovery privilege." *Verrazzano Trading Corp. v. United States,* 349 F.Supp. 1401, 1403 (U.S. Customs Court, 1972)."

The point in all this, of course, is that "[e]ven if we posit, *arguendo,* that * * * documents are exempt

from *disclosure,* it does not necessarily follow that they are privileged for purposes of civil discovery." *Pleasant Hill Bank v. United States, supra,* 58 F.R.D. at 99 (emphasis supplied). Thus petitioners' attempt to transform *exceptions* to the Public Information Act (which withhold certain documents from the *general public)* into *privileges* under the Federal Rules of Civil Procedure (which would withhold the same documents from *litigants)* has been directly rejected by the commentators and by the courts. In the words of Professor Moore, "[t]he Act did not repeal the Rules of Civil Procedure, of course, and under the Rules there is no general principle that makes information otherwise discoverable privileged because it was given in confidence." 4 Moore's Federal Practice, *supra,* ¶ 26.61 [4.-3] at 26-276. Unfortunately, petitioners did not see fit, either in the District Court or in this Court, to respond to the foregoing authorities which conclusively show that there is no Federal privilege "recognized" by 5 U.S.C. § 552.

In the preceding pages, we have shown that (1) in Federal question cases the court is not bound by state privileges and (2) that the only attempt by petitioners to invoke a Federal privilege is without merit. However, even if this Court were to look to state law, there is no privilege which covers the documents here in question.



### C. *Under California Law Defendants Can Assert No Valid Privilege*

#### 1. *Section 1040(b)(1) of the California Evidence Code and Section 6254 of the California Government Code Do Not Create An Absolute Privilege*

Section 911 of the California Evidence Code provides that the only privileges recognized by California law are those created by statute. In opposing discovery in the District Court, petitioners relied partly upon Evidence Code Section 1040(b)(1), which provides in pertinent part that

> "A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:
> (1) Disclosure is *forbidden* by an act of the Congress of the United States or a statute of this state * * *" (emphasis supplied).

Since this portion of the statute requires petitioners to incorporate another statute which forbids disclosure, they have invoked Section 6254 of the California Government Code, which contains certain exceptions to the California Public Information Act. In this way, petitioners attempt to transform the usual exceptions to the *state* public information act into a judicial privilege, in exactly the same way as they did with the Federal Public Information Act. Such an effort, however, cannot succeed for the same reasons discussed in the preceding section of this memorandum. If any-

thing, State law is even more clear on this point than Federal law.

Initially, we note that Evidence Code Section 1040 (b)(1) requires defendants to invoke another state statute which *forbids* disclosure; yet Section 6254 of the Government Code merely provides that nothing in the Public Information Act "shall be construed to *require* disclosure" to the public of certain types of records (emphasis supplied). Indeed, Section 6254 explicitly provides that "[n]othing in this Section is to be construed as preventing any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law."[17] Therefore utilization of Government Code § 6254 and Evidence Code § 1040(b)(1) do not, even in combination, create an absolute privilege, since Section 6254 does "not impose an absolute prohibition on disclosure of the information in question." *Terzian v. Superior Court,* 10 Cal.App.3d 286, 294, 88 Cal. Rptr. 806, 813 (1970).

Equally explicit is the provision of Section 6260, to the effect that:

> "The provisions of this chapter shall not be deemed in any manner * * * to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state."

[17]And the legislative history of Section 6254 construes this sentence as placing "special emphasis upon the *need* to disclose records concerning the administration of a public agency unless specific prohibition against such a disclosure can be found in other sections of state and federal law." *See* Appendix to the Journal of the Assembly, Regular Session, 1970, Volume I at 11 (emphasis added). In other words, "[t]he responsible public official may make information available under this Section [§ 6254] but he is not required to do so under state law." *Id.* at 9.



In construing this sentence, the legislative history states that "*[t]he laws of discovery, which are undergoing evolutionary change in California, were not to be influenced by general records law*" (emphasis supplied). See Appendix to the Journal of the Assembly, *supra,* at 13 (emphasis supplied). Certainly it is difficult to know what Section 626- may mean unless it means, *inter alia,* that the exceptions contained in Section 6254 do not create privileges "under the laws of discovery of this state."[18]

Finally, respondents note that recent decisions by the California courts have rejected outright the notion that an absolute privilege attaches to the type of documents here in question. *See In re Prewitt,* 8 Cal.3d 470, 105 Cal.Rptr. 318 (1973); *In re Olson, supra,* 37 Cal.App. 3d 783, 112 Cal. Rptr. 579 (1974); *Terzian v. Superior Court, supra.* In *In re Olson, supra,* the court explicitly rejected a claim by the Department of Corrections that the petitioners' central files were "confidential" and therefore "privileged by statute and public policy." Relying upon *In re Prewitt, supra,* the court concluded (1) that a docu-

[18]The foregoing argument was made by respondents in the District Court (see Exhibit D at 34-36) and was apparently accepted by the Magistrate. Yet in their request for review by the District Judge (Exhibit J at 7-10), and again in their petition to this Court (pages 19-21), petitioners never even acknowledge, much less try to refute or distinguish, the authorities cited by respondents. Instead, petitioners continue to trot out the same discredited claims that certain *exceptions* to the State and Federal Freedom of Information Acts somehow create a privilege for purposes of federal discovery.

ment could be withheld only if the security of an institution would be jeopardized or an informant would be exposed to an undue risk of harm by disclosure, and (2) that the burden rests upon the Department of Corrections to show that such danger to an institution or to an informant is present. Therefore it is clear that in California there is no absolute privilege and that at most some documents may be withheld only upon a *showing* by the appropriate agency that the dangers of disclosure outweigh the benefits which would result therefrom. That standard, of course, is essentially the one embodied in the conditional privilege afforded by California Evidence Code § 1040(b)(2), to which we now turn.

### 2. *California Evidence Code Section 1040(B)(2) Does Not Create A Conditional Privilege*

Although petitioners appear to have abandoned this position in this Court, it appears that in the District Court they argued that the *conditional* privilege created by Section 1040(b)(2) of the Evidence Code should apply to various documents involved in the instant petition. However, as we have already pointed out, petitioners have never even attempted to show (1) that the documents in question come within the statutory definition of "official information", (2) that disclosure of the information they contain "is against the public interest because there is *necessity* for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice"; or (3) that any real harm which might be



caused by disclosure could be obviated by the entry of a protective order. Instead, petitioners' position seemed to be that by simply *citing* to Section 1040, the Attorney General of California may, without more, obtain the conditional privilege which it provides. Yet Plaintiffs have already shown, in Section II of this memorandum, that a party resisting discovery has the clear burden of (i) filing a formal claim of privilege and (ii) making an adequate *showing* that any claim of privilege *in fact applies* to any given document.

If, however, this Court accepts the claim that these documents come within the ambit of Section 1040, it becomes necessary to determine whether "there is necessity for preserving the confidentiality of the information which outweighs the necessity of disclosure in the interest of justice." California Evidence Code Section 1040(b)(2). In a case of this sort, the reasons for rejecting the privilege in favor of disclosure would appear to be particularly persuasive, for at least three separate reasons.

*First,* the claim of privilege has been invoked by defendant state officials who have been charged with proceeding in an unconstitutional manner, in order to keep relevant documents and information hidden from plaintiffs and from the court.

> "Making even more compelling the need for judicial evaluation of the availability of the privilege is the fact that this is a suit against the highest official of the very government agency asserting the privilege. In such cases there is a special danger in the government official having the power to define the scope of his own privilege,

free of supervision by the courts." *Carr v. Monroe Mfg. Co., supra,* 431 F.2d at 389.

*Second,* the action is one brought under 42 U.S.C. §1983 to redress the deprivation of federal constitutional rights. Thus an important public policy which is frustrated by petitioners' efforts to resist discovery "is that reflected in §1983 itself." *Wood v. Breier,* 54 F.R.D. 7, 10 (E.D. Wisc. 1972). As that court put it,

> "Section 1983 represents a balancing feature in our governmental structure whereby individual citizens are encouraged to police those who are charged with policing us all. Thus, it is of special import that suits brought under this statute be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden." *Id.* at 11.

Stated differently, this discovery motion does not align a private party, whose interest in obtaining discovery is personal to him and his interest in prevailing in the litigation, against the public interest in maintaining the confidentiality of state records. To the contrary, it is respondents who here promote the public interest in determining whether the state's parole system is operating in a constitutional manner, whereas the individual petitioner-defendants have a considerable personal stake in maintaining the *status quo. Cf. Brandenberger v. Thompson,* 494 F.2d 885, 888-89 (9th Cir. 1974).

*Third,* there is a significant public interest in ascertaining the truth in any litigation, which is, of course, the very basis for the extensive and liberal



discovery rules found in the Federal Rules of Civil Procedure. Thus the search for truth has become paramount, so that

> "civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial." *Hickman v. Taylor,* 329 U.S. 495, 507-08, 500 (1947).

This consideration is particularly compelling in the case at bar, since it is a class action—brought on behalf of all California prisoners and parolees—attacking what is probably the most important issue in California penology, to wit: the administration of the indeterminate sentence by the California Adult Authority.[18a] Moreover, the documents here sought are not only relevant but may well be crucial to the development of respondents' case. For if documents such as Exhibit 2 to this response, which help to establish the truth of the claims in respondents' complaint, are to be withheld from them and from the Court, respondents may well be unable to prove certain key elements of their cause of action. *See Olson v. Camp,* 328 F.Supp. 728, 731-32 (E.D. Mich. 1970); *Wood v. Breier, supra,* 54 F.R.D. at 12.

Against these three strong public policies, petitioners' assertion of privilege is patently inadequate, since they have not even attempted to make any *showing* that the documents requrested are in fact privileged, or

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[18a]See, e.g., Mitford, *Kind and Usual Punishment* (Harper & Row, 1973); *Inside Prison American Style* (R. Minton ed., Random House, 1971); San Francisco Chronicle, June 24, 1974, at p. 5.

to articulate for this Court the precise harm which would result if they were to comply with the discovery here sought. Nor have petitioners attempted a showing that any legitimate concern could not be met by the strong protective order issued by the District Court, which prohibits disclosure of the petitioners' personnel files to any person other than counsel for plaintiffs, and two investigators. Thus, in many cases a Federal court has resolved discovery motions in favor of disclosure at least in part upon its power to eliminate any real harm from disclosure by entering a protective order. *See, e.g., Garner v. Wolfinbarger, supra; Carr v. Monroe Mfg. Co., supra; Olson v. Camp, supra.* And, if petitioners can show that the protective order issued by the District Court should be expanded to cover other documents which they are obliged to produce, there is no reason to believe that the court would deny such a request. See *Carr v. Monroe Mfg. Co., supra,* 431 F.2d at 390. Thus it has been said that although the confidentiality of state documents is entitled to consideration, "in nearly every case involving similar state statutes * * * the balance has been struck in favor of disclosure in court proceedings. *Carr v. Monroe Mfg. Co., supra,* 431 F.2d at 390; *accord In re Prewitt, supra.*

It is clear, then, that the District Court did not abuse its discretion in resolving the competing considerations in favor of, rather than against, disclosure in this case. For in doing so the court made available to respondents potentially crucial information, while at the same time affording petitioners adequate pro-



tection from whatever legitimate harm disclosure might bring.

## IV

### The District Court Did Not Abuse Its Discretion By Declining To Conduct An In Camera Inspection

Perhaps the one claim pressed most urgently upon this Court by petitioners is that the District Court erred in not conducting an *in camera* inspection of the documents involved. Yet once again the petitioners did not even begin to make the sort of *showing* which would have justified—much less required—such an inspection.

We have already shown that petitioners' objections based upon privilege and relevance were and are without merit; and that in the District Court petitioners did not even bother to formally lodge a claim of privilege, to make a particularized showing that the documents come within the ambit of any recognized privilege, or to distinguish the legal authorities which squarely hold that neither the State nor the Federal Freedom of Information Act creates a privilege within the meaning of Rule 26. Thus the threshold justification that a party resisting discovery would have to make to obtain *in camera* inspection—that particular documents are likely to be irrelevant or privileged—was simply not made in the District Court, and on this ground alone that court did not abuse its discretion in denying *in camera* inspection.

Furthermore, petitioners cited to the District Court, as they cite to this Court, no authority whatsoever

that a District Court is *required* to conduct an *in camera* inspection of documents before ordering production under Rule 34. Thus on page 17 of their petition in this Court there appear citations to the only five cases advanced by petitioners in support of their claim: yet, amazingly enough, *three of those cases do not even mention in camera inspection,*[19] and the other two stand, at best, for the proposition that a District Court *may* in its discretion conduct an *in camera* inspection.[20] Petitioners are therefore in the position of asking this Court to (i) exercise its extraordinary mandamus jurisdiction and (ii) rule that the District Court has clearly abused its discretion, without citing a single case which stands for the proposition that, under the circumstances of the case at bar, the court was *required* to hold an *in camera* inspection.

In fact, the arguments *against in camera* inspection are weighty, and are particularly strong in the case at bar. The principal objection is that the District Court is simply in no position, at this stage of the proceedings, to be aware of respondents' trial strategy; to know what other evidence respondents have gathered (e.g. to know the contents of the 12 lengthy depositions which respondents have already taken, or the documents which respondents have obtained); to

[19] *See Carr v. Monroe Mfg. Co., supra, Bredice v. Doctors Hospital Inc.,* 50 F.R.D. 249 (D.D.C. 1970); *Walker v. Liberty Mutual Co.,* 48 F.R.D. 365 (E.D. Wisc. 1970).

[20] *See Committee for Nuclear Responsibility Inc. v. Seaborg,* 463 F.2d 788 (D.C. Cir. 1971); *Pleasant Hill Bank v. United States,* 58 F.R.D. 97 (W.D. Mo. 1973).



know what witnesses respondents intend to call; or to know what type of information would be useful for purposes of impeaching adverse witnesses. Therefore it would be virtually impossible for the District Court—in the absence of a coherent presentation of these matters by counsel for respondents—to rule intelligently, not only on questions of relevance but also on questions of privilege, since any privilege determination would require the balancing of the *utility* of disclosure against the dangers thereof.

Not surprisingly, this problem has been recognized by the courts. Thus in *Dennis v. United States,* 384 U.S. 855 (1965), involving a potential *in camera* inspection of grand jury minutes, the Court observed that it would be difficult for even the most able trial judge to pick out all of the testimony which would be useful in impeaching a witness at trial.

> "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however consciously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can probably and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process * * *." *Id.* at 874-75.

Similarly, in *Natta v. Zletz,* 405 F.2d 99 (7th Cir. 1968), the Seventh Circuit applied and followed the quoted language in a civil case, recognizing that only the discovering party was in a position to recognize

what would be useful to the presentation of its case. Similarly, it has been recognized that if documents are presented to a court separately by the objecting party, then only one side is able to characterize the nature of the documents and present the dangers of disclosure, which (i) may not be true or (ii) may be outweighed by countervailing considerations which are never brought to the court's attention. *See, e.g., Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973). "This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." *Id.* at 824.

In addition, the task of conducting an *in camera* inspection usually requires a significant amount of judicial time and energy; often "the cost in terms of judicial manpower would be immense." *Vaughn v. Rosen, supra,* 484 F.2d at 825. In the case at bar, petitioners claim that the District Court should have inspected, *in camera,* not only the 25 personnel files but all of the documents in the possession of the Adult Authority (petition at 19-21). No showing was made, however, that such a task would be managable; to the contrary, one ground for resisting discovery in the District Court (abandoned here) was that locating and producing the requested documents would take an undue amount of time. Surely the District Court is the best judge of the amount of time which it has available for such tasks, and it certainly cannot be said to have abused its discretion in declining to take on an additional task of this nature in the absence of any showing that it would be managable. Nor is the



expenditure of judicial manpower on *in camera* inspections limited to the District Court: for if a party wishes to contest an *in camera* decision to release or withhold certain documents, the same painstaking investigation already made by the District Court would have to be repeated by at least two judges of this Court. *See Vaughn v. Rosen, supra,* 484 F.2d at 825.

Finally, it is clear that whatever potential harm might be caused by the disclosure of the personnel files in this case is adequately guarded against by the issuance of the protective order. *See Natta v. Zletz, supra; Olson v. Camp, supra.* If petitioners have any apprehension that serious harm might result from the release of one or more *particular* documents required to be produced pursuant to the District Court's order, their obvious and quite adequate remedy would be to ask the District Court to extend the protective order to cover such documents. *See Car v. Monroe Mfg. Co., supra,* 431 F.2d at 390.

For all of the foregoing reasons, it is obvious that petitioners have failed to show, either in the District Court or in this Court, that they are entitled *as of right* to an *in camera* inspection by the District Court. In fact, the law is to the contrary, and therefore petitioners are in effect seeking a ruling that the District Court abused its discretion by not departing from well settled law. This is a curious position at best.

## V

### The Use of Mandamus Is an Extraordinary Remedy in the Federal Courts and Is Not Proper in This Situation

Congress has strictly limited piecemeal appeals, and therefore a writ of mandamus should be granted only in exceptional circumstances in the Federal system. See, 28 U.S.C. §§1291, 1292. Mandamus cannot be used as a substitute for appeal, *Ex parte Fahey,* 332 U.S. 258, 260 (1947), unless an act or omission on the part of the District Court has thwarted or tends to thwart appellate review of the ruling, *Roche v. Evaporated Milk Assoc.,* 319 U.S. 21, 26 (1942). This is true even though hardship may result from delay and perhaps unnecessary trial. *Bankers Life and Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953).

Realizing that some interlocutory orders mgiht be erroneously made in the course of trial, Congress passed the All Writs Act, 28 U.S.C. §1651, and vested the courts with extraordinary review power. It is clear, however, that only exceptional circumstances amounting to judicial "usurpation of power", *Will v. United States,* 389 U.S. 90, 95 (1967), or "clear abuse of discretion", *Bankers Life and Casualty Co. v. Holland, supra,* will justify invoking this remedy. Use of the writ of mandamus is discouraged, not only to prevent disruptive and fragmentary appeals, but also because issuance of such an order places the District Court Judge in an awkward position.

> ". . . They have the unfortunate consequence of making the judge a litigant, obliged to obtain



> counsel or to leave his defense to one of the litigants before him." *Ex parte Fahey, supra.*

In view of these circumstances, "the party seeking mandamus has 'the burden of showing that its right to issuance of the writ is "clear and indisputable" '." *Will v. United States, supra,* at 96.

Following the clear mandate of the Supreme Court, this Court has said that the writ of mandamus is to be used "sparingly". *Mohasco Industries, Inc. v. Lydick,* 459 F.2d 959, 960 (9th Cir. 1972). This Court has further stated:

> "In order to eliminate delays incident to fragmentary appeals, this court has ever been reluctant to resort to the extraordinary writs as means for interlocutory review of discovery orders unless such orders disclose a prejudicial usurpation of authority not correctable on appeal. *Belfer v. Pence,* 435 F.2d 121, 122 (9th Cir. 1970)." *See also Cmax, Inc. v. Hall,* 290 F.2d 736, 739 (9th Cir. 1961); 4 Moore's Federal Practice, ¶26.83 (1970 ed.).

In the case at bar, petitioners have not begun to satisfy these standards for review by way of mandamus.[21] It is undisputed that discovery orders gener-

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[21] Petitioners' reliance upon *United States Board of Parole v. Merhige,* 487 F.2d 27 (4th Cir. 1973), is misplaced. Unlike the case at bar, the allegations in the complaint in *Merhige* raised "only questions of law and we fail to see any necessity for extensive evidentiary development • • •." *Id.* at 28. However, resolution of the instant action must by its very nature eventually turn upon the facts to be adduced at trial, which will either sustain or refute the detailed factual allegations contained in the complaint. Thus whereas plaintiffs in *Merhige* charged, e.g., that the parole board's regulations were at variance with Federal Statutes, plaintiffs in the case at bar have charged that the board members are unqualified,

ally are committed to the sound discretion of the District Court, and will not be overturned unless there is a clear abuse of that discretion. *Bank of America Nat. Sav. & Loans Ass'n. v. Hayden,* 231 F.2d 595, 606 (9th Cir. 1956); 8 Wright & Miller, supra, §2215 at nn.68-69 and accompanying text. "There is, of course, a broad discretion in the trial court, and it is unusual to find abuse of discretion in these matters." *Swanner v. United States,* 406 F.2d 716, 719 (5th Cir. 1969).[22] Therefore, even if it appeared to this Court that the District Court may have erred—or that the members of this Court would have ruled differently—the instant petition should be denied unless a clear abuse of discretion also appears.

But as this answer has shown, the District Court was by every standard and for many reasons clearly

that the written material upon which their decisions are based is unreliable, that there is an inadequate amount of time in which to conduct the hearings, that prisoners are incapable of presenting their case without counsel, and so forth—all factual questions which can be answered only by "extensive evidentiary development", including the discovery here at issue. The *Merhige* case is readily distinguishable on other grounds as well, since (1) *Merhige* deals with the Federal Parole Board and its regulatory scheme, which is far different than California's; (2) the interrogatories at issue in *Merhige* bore "little, if any, relation to the questions of law which plaintiffs seek to raise", *Id.* at 29; and (3) in *Merhige* the focus of discovery was on whether the board had correctly decided a large number of cases, and therefore raised the spectre of extensive judicial intervention into the parole process, *ibid.* By contrast, respondents in the case at bar seek a conservation of judicial time and energy by resolving, once and for all in this class action, the basic questions concerning the constitutionality *vel non* of the procedures followed by defendant members of the California Adult Authority.

[22]And, to the extent that the petition focuses upon the refusal of the District Court to conduct an *in camera* inspection, petitioners deal with that part of discovery which is *most* committed to the discretion of the trial court and thus *least* likely to constitute an abuse of discretion.



correct in its ruling. For as we have seen, petitioners have claimed privilege without ever lodging a formal claim thereof; without ever making the requisite showing that the documents in question (which were never described with any particularity) come within the terms of the privilege asserted; and without ever dealing with the authorities presented by respondents to the effect that no privilege exists. They have claimed that the documents are irrelevant without ever discussing the proper standard of relevance established by Rule 26 of the Federal Rules of Civil Procedure (*compare* respondents' discussion of this issue in Exhibit D at 4-7 and 15-16), and without a particularized showing that the specific documents in question are not relevant within the meaning of Rule 26. They have argued that the District Court abused its discretion in not ordering an *in camera* inspection, and in support thereof have cited five cases, three of which do not even mention *in camera* inspection and two of which indicate only that such an inspection is permissible *if* the court sees fit to conduct one.

In short, it is difficult to imagine a case which is a less appropriate candidate for extraordinary relief by way of mandamus, even if this Court believes that it would be helpful for it to consider and resolve some of the issues here presented. If that is true, another case on another day would present a far more effective and equitable vehicle for appellate intervention in the trial process.

## Conclusion

For all of the foregoing reasons, petitioners' petition for a writ of mandamus should be denied.

Dated: August 29, 1974.

B. E. Bergesen, III

Fay Stender

Sidney M. Wolinsky

/s/ B. E. Bergesen, III

B. E. Bergesen, III

Attorneys for Plaintiffs-Respondents (Real Parties in Interest)

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[Exhibit A]

July 17, 1974

Honorable Emil E. Melfi, Jr.
Clerk, U.S. Court of Appeals
for the Ninth Circuit
Seventh and Mission Streets
P. O. Box 547
San Francisco, CA 94101

Re: *Kerr v. Weigel, No. 74-2206*

Dear Sir:

By letter dated July 16, 1974, petitioners invited the Court's attention to *Wolff v. McDonnell,* ..... U.S. ....., 42 U.S.L.W. 5190 (June 26, 1974). Specifically, petitioners contend that a statement in *Wolff* regarding the nonretroactivity of *Morrissey v. Brewer,* 408



U.S. 471 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973), supports the claims made by them at footnote 2, pages 5-6, of their petition for a writ of mandamus in the above-captioned case. In reply, those respondents who are plaintiffs in the District Court would point out that (1) the footnote itself is inaccurate and extremely misleading to this Court, and (2) the nonretroactivity of *Morrissey* and *Gagnon* is legally irrelevant to the litigation now pending in the District Court.

*The Footnote 2 is Inaccurate*

In their footnote No. 2, petitioners contend that —as a result of recent court decisions—the rights sought by plaintiff-respondents in the District Court "require neither this litigation nor extensive discovery for their establishment or vindication." Petition for Mandamus at 5 n. 2. This statement is simply untrue, for the following reasons. *First,* virtually none of the important rights at issue with respect to term-fixing and parole release hearings—which are at the heart of this case—were established by the two state court cases cited by petitioners in their footnote 2. *Compare In re Olson,* 37 Cal.App.3d 783 (1974) and *In re Sturm,* ..... Cal. 3d ..... 1974 *with* the prayer for relief in respondents' complaint (petitioners' Exhibit A, pages 31-33). These hearings affect all 23,000 California inmates, whereas parole revocation procedures apply to only a fraction of the persons presently on parole, and thus it is obvious that for this reason alone petitioners' argument is without merit. *Second,* those procedural rights contended for in respondents'

complaint which *have* been extended to parole *revocation* hearings (by the cases cited in footnote 2) have been granted in an extremely limited and qualified way, so that once again the relief sought by respondents is considerably broader than that presently available to them. *Third,* as respondents themselves point out in their letter of June 16, neither *Morrissey* nor *Gagnon* are to be applied retroactively, and thus afford no relief to those members of respondents' class whose parole was revoked or rescinded prior to the effective dates of those decisions.

Accordingly, if plaintiff-respondents are to obtain, for themselves and their class, the important rights sought in their complaint, it is obvious that they can do so only by making a strong and *specific* record in the District Court. Such a record, however, simply cannot be made without the discovery which they seek, and to which they are clearly entitled under the Federal Rules of Civil Procedure (see petitioners' Exhibit D). At the very least, however, such discovery should be denied on the ground that the relief sought has already been granted, when that is not in fact the case.

*The Non-retroactivity is Irrelevant*

That neither *Morrissey* nor *Gagnon* are retroactive has always been clear, since the opinion in *Morrissey* explicitly states that the due process requirements there announced were to be "applicable to future revocations of parole", 408 U.S. 471, 490 (1972); and this Court early held *Morrissey* not to be retroactive in *M'Clary v. California Adult Authority,* 466 F.2d



1122 (9th Cir. 1972). Therefore it is altogether unnecessary for petitioners to cite to the Court, for this proposition, the case of *Wolff v. McDonnell, supra.*

Furthermore, the non-retroactivity of *Morrissey* and *Gagnon* is completely irrelevant, since neither case pertains to the term-fixing and parole release hearings which, as noted above, constitute the heart of this case in the District Court. However, to the extent that respondents do seek a declaration that certain procedural due process safeguards were required with respect to events which antedated *Morrissey* and *Gagnon,* they do so not upon the ground that those decisions are retroactive, but rather upon the ground that fundamental due process concepts, previously announced by the United States Supreme Court, compel such a result. See, e.g., *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Greene v. McElroy,* 360 U.S. 474 (1959).

This was the position taken by the Fifth Circuit in the case of *Van Blaircom v. Forscht,* 473 F.2d 1323 5th Cir. 1973). In that case, the court declined to decide the retroactive effect of *Morrissey* "because the procedure employed in revoking Blaircom's parole did not conform to the constitutional requirements made applicable by *Goldberg v. Kelly, supra.*" *Id.* at 1329.[1] Indeed, prior to *Morrissey* this Court

[1]In subsequent orders, the Fifth Circuit withdrew that part of the opinion which contains the foregoing passage as unnecessary to its decision, to which it adhered on statutory grounds. See *Van Blaircom v. Forscht,* 489 F.2d 1034 (5th Cir. 1974). Thereafter, the Fifth Circuit, *en banc,* vacated its initial decision, as modified, upon learning that Van Blaircom was a fugitive prior to the panel's initial decision. See *Van Blaircom v. Forscht,* 490 F.2d 461 (5th Cir. 1974). However, neither the withdrawal nor the vacation of the court's initial opinion was upon the ground that the sentence quoted above is an incorrect statement of the law.

itself held that challenges to parole revocation decisions would have to be made on a case-to-case basis in order to determine whether there was a violation of the Due Process Clause. See *Dennis v. California Adult Authority,* 456 F.2d 1240 (9th Cir. 1972).

Finally, respondents wish to point out that on July 11, 1974, Judge Weigel stated, from the bench, his intention to issue an order that the case be maintained as a class action, pursuant to Rule 23(b)(2), F.R.C.P., and directed counsel for respondents to submit proposed orders for his signature. Accordingly, petitioners' statement (at page 4 of their petition) that the District Court has not yet ruled on this issue is no longer the case. The fact that this action will proceed as a class action in the District Court is yet another reason why the discovery recommended by the Magistrate and ordered by the District Judge should go forward in due course.

In accordance with Rule 1, Rules of the United States Court of Appeals for the Ninth Circuit, it is requested that the enclosed copies of this letter be furnished to the panel considering the petition.

Yours very truly,

B. E. Bergesen, III
Attorney for plaintiff-respondents

/re

cc: Honorable Stanley A. Weigel
Karl S. Mayer, Esq.
Deputy Attorney General



[Exhibit B]

State of California—Human Relations Agency

Memorandum: Date: July 19, 1971

To: Superintendent, California Conservation Center
Superintendent, California Correctional Institution
Superintendent, California Institution for Men
Superintendent, California Institution for Women
Superintendent, California Medical Facility
Superintendent, California Men's Colony
Superintendent, California Rehabilitation Center
Superintendent, Correctional Training Facility
Superintendent, Deuel Vocational Institution
Superintendent, North Coast Conservation Center
Superintendent, Sierra Conservation Center
Superintendent, Southern Conservation Center
Warden, Folsom State Prison
Warden, San Quentin State Prison
Deputy Director, Parole & Community Services Div.

Attention: Classification and Parole Representatives

From: Department of Corrections, Sacramento 95914

Subject: .....

The Adult Authority has recently brought several concerns to our attention. In order to improve our service to them and insure that departmental policy is being followed, the following will apply:

1. In order to facilitate communication and Board planning, C&PR's will contact the Coordinator

scheduled to be at his institution on the Wednesday of the week prior to the Board's arrival. The C&PR will inform the Coordinator of the total number of cases scheduled to appear before Board panels, and of the types of cases by panel composition. This will enable the Coordinator to issue instructions to the C&PR and will also enable the Coordinator to arrange appropriate panels to meet the Board Workload.

2. In some instances, inmates are permitted to bring letters and/or written materials into the Board hearing rooms. In other instances, staff does not permit an inmate to carry in information that they wish to bring to the Board's attention. This latter development has probably come out of previous Board Members indicating to staff that they do not want inmates to bring items into the Board, but that the Board report should contain all necessary information on which to base a decision. Some inmates become tongue-tied or emotionally involved, and during the course of the interview, forget what they really desire to discuss with the Board. It is suggested that should an inmate desire to make a few notations on a 3 x 5 card to remind himself of items he wishes to bring to the Board's attention, such practice should be not only permitted, but encouraged.

   An inmate should be discouraged from bringing in, for example, a thirty page hand-written document that he desires for the Board to read prior to reaching a decision in his case. However, a letter



from a wife, employer, or family friend should be permitted to be brought in, and inmates might be encouraged to make a few brief notations on a 3 x 5 card that could be supplied them and which would serve as a reminder of specific items they wish to discuss with the Board.

3. When a man is given a date with the specific provisions that he complete a certain type of training, that inmate will be given priority for placement in the training in time for its completion prior to reaching the parole date.

   In the future, the Board plans to use terminology, "that parole is specifically conditioned upon the completion of his trade training."

If you have any questions, please give me a call.

/s/ R. E. Doran
R. E. Doran
Acting Deputy Director
Camps and Inmate Relations

cc: Mr. Henry W. Kerr
Mr. L. M. Stutsman

[Statement of Service Omitted in Printing]

[Title Page, Topical Index, Table of Cases, Caption Omitted in Printing]

United States Court of Appeals
For the Ninth Circuit

No. 74-2206

[Filed September 4, 1974]

[Caption Omitted in Printing]

PETITIONERS' REPLY TO RESPONDENT'S ANSWER TO PETITION FOR WRIT OF MANDAMUS

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PRELIMINARY STATEMENT

By order dated August 15, 1974, this Court required that answers to the petition for writ of mandamus be filed on or before August 29, 1974, and that petitioners may file on or before September 4, 1974, a reply to any answers which may be filed. On August 30, 1974, petitioners received "Respondent's Answer to Petition for Writ of Mandamus" containing a statement of service that it was mailed August 29, 1974. There follows petitioners' reply to this answer.

ARGUMENT

I

THE RESPONDENT'S ANSWER IS SELF-CONTRADICTORY IN ITS ENTIRETY.

Argument I of respondents' answer contends that the documents requested are highly relevant to the subject matter of the litigation and goes on to discuss at great length why they think each of the documents



demanded is obviously relevant to the action (Respondents' Answer, pp. 6-16). Argument IV of respondents' answer, on the other hand, contends that the district court did not abuse its discretion by declining to conduct an in-camera inspection and supports this argument by asserting that the arguments against an in-camera inspection are weighty and particularly strong in this case because the district court is simply in no position to rule intelligently on questions of relevance (Respondents' Answer, p. 38).

Petitioners have more confidence in the district judge's capacity. Indeed, the in-camera inspections requested by petitioners would seem particularly appropriate in this case where all of the issues will be tried exclusively by the judge and where both sides have agreed that no jury has been demanded and that none is required or appropriate. It is Judge Weigel who will decide in the first instance whether, and if so what, process is due at the various proceedings designated in the complaint below, and it is Judge Weigel who will decide in the first instance what information will be considered and what weight will be given to such information. Instead of rendering the district judge helpless to arrive at an intelligent decision, as contended by respondents, it is petitioners' view that these circumstances place the district judge in a particularly strong position to conduct an in-camera inspection of the documents to determine whether any of their content is relevant to the issues which he will be called upon to resolve, and if so whether that relevance is outweighed by defendants'

interests in not furnishing these documents for adversary inspection or for presentment and discussion in open court during trial and inclusion in the public record.

Respondents' answer is also self-contradictory in that it asserts on the one hand that various federal and state statutes and rules respecting privilege are inapplicable (Respondents' Answer, pp. 19-32), but on the other hand asserts that some failure to comply with such rules renders petitioners' assertions of privilege insufficient (Respondents' Answer, pp. 16-19).

## II

### Respondents' Assertions That Petitioners Have Made No Legally Sufficient Claim of Privilege Are Nonsense.

Respondents' answer (Answer, pp. 16-19) contends that in order to invoke an applicable privilege petitioners should have filed some kind of formal document which must be signed personally by the defendant and which must identify each document with respect to which the privilege is asserted. The two cases relied on by respondents, *United States v. Reynolds,* 345 U.S. 1 (1953), and *Carr v. Monroe Mfg. Co.,* 431 F.2d 384 (5th Cir. 1970), are inapposite. Both cases involve assertions of privilege by persons *not* parties to the actions. In *Reynolds* the privilege was asserted as an absolute and was honored as such by the court. Both cases spoke of a need for court control over assertions of privilege by the executive branches of government: "Judicial control over the evidence in a



case cannot be advocated to the caprice of executive officers." *Carr v. Monroe Mfg. Co., supra,* 431 F.2d at 388. Petitioners' request for an in-camera inspection prior to the disclosure of the documents for adversary inspection is the very antithesis of requesting the court to advocate control over the evidence to the caprice of executive officers.

The defendants in this action are the Director of Corrections, the Chairman of the California Adult Authority and the members of the California Adult Authority. The documents demanded are Department of Corrections and Adult Authority documents. The objections to production of these documents for adversary inspection have been made by these defendants through counsel. In asserting the privilege, and in requesting an in-camera inspection prior to disclosure of the documents for adversary inspection, defendants recognize that the privilege asserted is not absolute but is a qualified privilege. Petitioners understand the *Reynolds* court's requirement for a formal document claiming the privilege because the privilege therein asserted and honored was an absolute privilege of nondisclosure, including even disclosure to the court, and was raised by a person not a party to the action. Recent developments in the law respecting assertions of executive privilege in the face of discovery demands under the federal rules have proceeded without reference to any personal formal claim of privilege, e.g., *Committee for Nuclear Responsibility, Inc. v Seaborg,* 463 F.2d 783 (D.C. Cir. 1971); *United States Nixon,* ..... U.S. ....., 42 U.S.L.W. 5237 (No. 73-1834, July 24,

1974). Indeed, the Nixon case casts doubt on the existence of any absolute executive privilege and therefore casts doubt on the court's reasoning in the *Reynolds* case.

The privilege asserted by defendants with respect to the document demanded by respondents calls only for an examination and evaluation of the documents by the court prior to their disclosure for adversary inspection. The privilege asserted therefore expresses no interest in withholding from the court the truth or any information.

Respondents' assertions that defendants' objections on grounds of privilege lack specificity are also ill-conceived. The objections on the grounds of privilege are as specific as respondents' demands for the documents.

## III

### The Documents Demanded Manifestly Do Not Relate to the Allegations Listed By Respondents (Answer, PP. 3-4).

Respondents' answer contends the documents are necessary because plaintiffs have alleged, and therefore must prove at trial, a number of things listed at pages 3-4 of the answer. The documents with respect to the furnishing of which defendants have objected on grounds of privilege are manifestly unrelated to respondents' list of allegations on pages 3-4 of the complaint. Only the personnel files demanded in Item No. 7 of respondents' request for documents conceivably could relate to the first listed



allegation. Defendants acknowledge that some of their personnel files may disclose law enforcement backgrounds, but see no reason for plaintiffs to suspect that these files decribe law enforcement backgrounds as "narrow," or "disclose anti-prisoner biases" or "stereo-typical thought patterns." In any event, each of the members of the Adult Authority have been extensively deposed by counsel for plaintiffs and the depositions included many questions respecting each of the members' backgrounds. Furthermore, extensive biographical data respecting each member and each hearing representative of the Adult Authority have been furnished plaintiffs in response to their first and second sets of interrogatories. None of the document demands at issue in these mandate proceedings relate to any of the other allegations listed on pages 3 and 4 of the answer.

## IV

### Information Relating To These Allegations Has Been Furnished In Copius Amounts.

Not only do the documents demanded by respondents, and at issue in these mandate proceedings, manifestly not relate to the allegations listed in pages 3-4 of the answer, but information which does relate to these allegations has in fact been furnished plaintiffs. Information respecting the backgrounds and thought processes of the members of the Adult Authority and of the hearing representatives has been furnished through depositions of each of the members of the Adult Authority and of several of the hearing

representatives. Furthermore, in answer to plaintiffs' first and second sets of interrogatories extensive biographical information respecting each of the members and hearing representatives has been furnished respondents. Respondents are fully informed of the procedures for inclusion of materials in prisoners' files, have taken an extensive deposition of a Department of Corrections correctional counselor, have taken the depositions of each of the members of the Adult Authority and several hearing representatives, have been furnished for adversary inspection the files of each of the named plaintiffs to the action, and, according to another order of the district court, are entitled to examine up to 200 additional inmate files.

Respondents are also fully informed of the hearing procedures followed by the Adult Authority. Again, each of the members of the Adult Authority and several hearing representatives have been deposed at length by counsel for plaintiffs and these depositions related almost exclusively to Adult Authority hearing procedures including the sources of information considered at the hearings. In addition, pursuant to order of the court, respondents have been permitted to tape record approximately 340 Adult Authority hearings during the month of August, 1974, and are permitted to record well over 200 additional Adult Authority hearings during the month of September, 1974. The tape recordings of these hearings are in the custody of counsel for plaintiffs for as much listening and inspection as counsel deems appropriate. The tape recordings have been and the tape machines operated



by persons, not only unconnected with California's correctional system, but designated by counsel for plaintiffs. The presence of these persons at each of the hundreds of hearings recorded, furnishes an abundant source of testimony for respondents. Furthermore, some twenty-four California attorneys, also designated by counsel for plaintiffs, attended hundreds of Adult Authority hearings conducted during the month of July, 1974. These attorneys also furnish plaintiffs an abundant pool of possible testimony and information respecting the conduct of Adult Authority hearings. In addition, each of the more than 20,000 California state prison inmates furnishes respondents a source of information and testimony respecting the conduct of these hearings since each of the inmates have themselves participated in such hearings.

It is no secret that at parole granting hearings the California Adult Authority applies no rigid or fixed criteria since this factor was recognized by this Court in its opinion in *Dorado v. Kerr,* 454 F.2d 892, 897 (9th Cir. 1972). It is interesting to note that the attorney who has filed the answer in the instant proceedings was also the attorney who argued on behalf of the appellant in *Dorado v. Kerr, supra.* Furthermore, counsel for respondents asked many questions regarding what criteria and what thought processes are followed by each of the members of the Adult Authority—these questions were asked during counsel's depositions of each of the members.

## V

### Respondents' Characterizations of Their Demands for Documents (Answer, P. 8) Is Inaccurate and Misleading.

On page 8 of their answer, respondents purport to list a summary of the documents demanded by them but objected to by petitioners on grounds of privilege or confidentiality. This summary is incomplete and misleading.

Respondents summarized the documents demanded in their request No. 7 as "the personnel files of defendant Adult Authority members" (Respondents' Answer, p. 8:8-9). The text of their demand No. 7 is as follows:

> "All files, including all personnel files, which are maintained by the Adult Authority or by the Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the executive officer of the Adult Authority."

Respondents summarize the documents demanded in their request No. 14 as follows:

> "Reports submitted by Adult Authority members and hearing representatives" (Answer, p. 8:9-14).

The text of respondents' demand No. 14 is as follows:

> "Each report submitted by any member, hearing representative, executive officer, or any other employee or official of the Adult Authority, including without limitation all reports of the type indicated



> at lines 9-11 of page 21 of the aforementioned deposition [deposition of Henry Kerr on January 22, 1973]."

Respondents summarize their eighteenth demand for documents as follows:

> "Written proposals for changing various aspects of the Adult Authority" (Answer, p. 8: 13-14).

The text of respondents' eighteenth demand for documents is as follows:

> "All written proposals for any change whatsoever in the organization or operation of, qualifications for, or substantive criteria and procedures to be employed by the Adult Authority, including without limitation any of the individuals or groups listed in the foregoing item [(1) the Adult Authority or any member, hearing representative, official or employee thereof; (2) any executive, judicial, legislative or other governmental agency or organization; (3) any private foundation or other private individual organization.]"

Respondents summarize their twentieth demand for documents as follows:

> "Memoranda written by defendant Henry Kerr, who at the time the complaint was filed was Chairman of the Adult Authority" (Respondents' Answer, p. 8:14-16).

The text of respondents' twentieth demand for documents reads as follows:

> "All memoranda written by the Chairman of the Adult Authority during the past five years, no matter to whom sent, including without limita-

tion memoranda sent to other government organizations, agencies or officials, or to other members, hearing representatives, officials or employees of the Adult Authority."

Respondents summarize their twenty-first demand for documents as follows:

"Documents which pertain to Adult Authority policy statements or resolutions" (Answer, p. 8: 16-17).

The text of respondents' twenty-first demand for documents reads as follows:

"All *documents* in effect on November 15, 1972, which pertain to any policy statement or resolution issued by the Adult Authority, including without limitation any file maintained on any resolution or policy statement and all such documents executed or issued subsequent to that date" (emphasis added).

At the beginning of respondents' request for documents the term "documents" is defined to "include all correspondence, memoranda, or other records or writings of any kind, or copies thereof where the originals are not available, including, without limitation, files, books, pamphlets, periodicals, letters, reports, charts, diagrams, records, drafts, studies, working papers, notes, papers, ledgers, journals or other books of account, minutes of meetings (including, without limitation, every sort of staff meeting held by the California Adult Authority or the California Department of Corrections) diaries and personal inter-office memoranda."



Respondents summarize their twenty-second demand for documents as follows:

"Documents which concern the Adult Authority's adoption of new policies, procedures and criteria" (Answer, p. 8:18-19).

The actual text of respondents' twenty-second demand for documents reads as follows:

"All documents [see definition of documents above], however formal or informal, issued during the past calendar year, which concern the Adult Authority's adoption of new policies, procedures, criteria, and the like, to be followed by members, hearing representatives, officials and employees, including without limitation all documents relating to (A) Policy Statement No. 24, adopted March 27, 1973, and (B) Resolution No. 129, revised and reissued May 21, 1973."[1]

Following this misleading summary of their demand for documents, respondents in their answer assert that every document demanded is crucially important to their case. At pages 8-12 of the their answer respondents assert the need for personal data concerning the decision-makers—the Adult Authority members and hearing representatives. As has been noted above, extensive personal data concerning each of these persons has actually been furnished to respondents. This data includes the work record of each of these persons from the time they left high school, their complete

[1]All of the above quoted demands for documents are taken from the text of respondents' "Request for Production of Documents" which is attached as Exhibit B to the Petition for Writ of Mandamus.

educational background, their military service and type of discharge, their membership in various organizations, and even includes a list of the magazines to which each of them subscribe.

At pages 12-15 of their answer respondents contend that "a vitally important source of evidence with respect to the procedures and criteria followed by, and the sort of results reached by, the Adult Authority members and hearing representatives is furnished by the other six types of documents requested by respondents . . ." (Respondents' Answer, p. 12:3-7). As we have noted above, respondents are fully informed of the procedures and criteria followed by, and the sort of results reached by, the Adult Authority members and hearing representatives. Each of these persons has been deposed at length by counsel for plaintiffs and the subject matter of the depositions related almost exclusively to the hearing procedures, the criteria followed, and the sort of results reached by the members and hearing representatives. In addition, hundreds of actual hearings have been recorded by plaintiffs and the tapes of these hearings are in plaintiffs' custody for examination at their leisure. Similarly, dozens of persons designated by plaintiffs have attended hundreds of Adult Authority hearings and are available to inform plaintiffs or the court of what takes place at these hearings. Finally, petitioners have invited Judge Weigel to attend Adult Authority hearings.

The action below is not a presentation to a legislative sub-committee but is a federal question case



where the federal questions are whether, and if so what process is due at various disciplinary and parole proceedings. Internal criticism or proposals for change in the procedures are obviously irrelevant to what the United States Constitution would require of these proceedings in the name of due process. Each of the cases which have developed the requirements of due process at proceedings wherein the government may injure a person have relied exclusively on an analysis of the nature of the proceedings as conducted, and of the nature of the interests involved. None of these opinions have relied on information such as plaintiffs' demand. See, e.g., *Goldberg v. Kelly,* 397 U.S. 254 (1970); *Morrissey v. Brewer,* 408 U.S. 471 (1972); *Gagnon v. Scarpelli,* 411 U.S. 778 (1973); *Wolff v. McDonald,* ..... U.S. ....., 42 U.S.L.W. 5190 (June 26, 1974).

Resolution of the due process issues sought to be resolved in the action below should not depend on the personality or competence of the individual officers who preside over the designated hearings. The requirements of due process at criminal proceedings are in no way related to the background, personality, competence, predelictions, or any other personal data respecting the trial judge even though judges vary significantly in their backgrounds. A different rule should not be followed to tailor administrative due process to the hearing officer instead of to the proceeding.

## VI

### Respondents' Arguments That The Documents Demanded Are Not Privileged Support Petitioners' Objections Which Raise A Qualified Privilege, But Not An Absolute Privilege.

At pages 19-24 of respondents' answer numerous authorities are discussed and cited by respondents for the proposition that the documents demanded by them are not privileged. These authorities, while not recognizing an absolute privilege, do recognize that objections to discovery demands on grounds of privilege call for federal courts to independently weigh the competing interests. This is what petitioners' seek by their assertion of a qualified privilege and request for an in-camera inspection. Respondents, on the other hand, argue against such an informed weighing of the competing interests. Respondents claim that the district judge will not be fully informed of plaintiffs' interests. By objecting to any in-camera inspection, respondents would preclude the district judge from being fully informed, on the basis of the information and the documents demanded, of petitioners' interests. It is respondents, not petitioners, who are taking steps to attempt to preclude the district judge from making an informed decision with respect to the competing interests involved in respondents' demands for these documents. It is respondents who are taking steps to withhold information from the district judge, to withhold the truth from the district judge.

Respondents' answer, pages 28-36, proceeds with a simliar discussion with respect to California author-



ities and asks this Court to assume that petitioners here claim some absolute privilege with respect to the documents demanded. Again, the privilege raised here by petitioners is a qualified privilege which requests only that the district judge exercise some informed discretion with respect to whether these documents must be disclosed for adversary inspection and in doing so to balance the competing interests of the parties.

## VII

### Respondents' Reasons For Rejecting Petitioners' Objections In Favor of Disclosure Are Not Persuasive.

Respondents' answer pages 33-36 asserts three reasons why petitioners' objections must be rejected in favor of disclosure for adversary inspection of every document demanded by respondents. The first such reason is that "the claim of privilege has been invoked by defendant state officials who have been charged with proceeding in an unconstitutional manner, in order to keep relevant documents and information hidden from plaintiffs and from the court" (Answer, p. 33:9-12). Respondents then quote the opinion in *Carr v. Monroe Mfg. Co., supra,* for the proposition that there is a special danger in a government official having the power to define the scope of his own privilege free of supervision by the courts. As opposed to the situation in *Carr,* petitioners are affirmatively seeking supervision by the court and it is respondents who are claiming that the federal rules of discovery are so broad that the court has no discretion to exercise

supervision. By requesting an in-camera inspection, petitioners are obviously not attempting to keep relevant documents from the court and are obviously not attemtping to invoke any privilege, absolute or qualified, free of supervision by the courts.

Respondents' second reason seems to assert that the federal rules of discovery must be especially broad in a civil rights action brought to vindicate constitutional rights. Respondents here distinguish the parties in this action from the parties in a strictly private action, and assert that petitioners are opposing discovery because of their personal stake in maintaining the status quo. This Court, and counsel for respondents, are well aware of the sweeping changes made by defendants in California's correctional system. The correctional system, and the procedures followed by correctional and Adult Authority officials are in a constant state of change initiated by defendants. The defendants have responded promptly, in good faith and with liberal throughness to all of the requirements announced in the recent decisions, beginning with *Morrissey,* of both the federal and state courts. Defendants as individuals have no personal stake in maintaining the status quo.

The third reason advanced by respondents is that there is a significant public interest in ascertaining the truth in any litigation and that this interest is defeated by petitioners' objections (Answer, p. 34-35). Respondents here reason that petitioners' objections are designed to withhold the truth from the court. Again, petitioners objections are not intended to ac-



complish any such result, and the relief requested by petitioners will in fact fully inform the court since the court will have the opportunity to examine and weigh each of the documents demanded by plaintiffs.

Petitioners remind this Court that under the unique circumstances of this case their objections do not require the district judge to determine what documents will or will not be available to a jury as the trier of fact. The trier of fact in this case will be the same individual who will conduct the in-camera inspection. Petitioners have no objection to this being the case. Petitioners do not understand why respondents object to the district judge so informing himself of these documents.

## VIII

### Respondents' Arguments Against An In-Camera Inspection Are Not Well Taken.

On pages 36-41 of respondents' answer respondents argue against an in-camera inspection on the grounds that it would consume too much of the district judge's time, and on grounds that the district judge is in no position to intelligently rule on questions of relevance, privilege or utility of the documents demanded.

Petitioners submit that respondents' interests in not unduly consuming the district judge's time would best be served by stating their demands with more specificity. It is petitioners' view that Judge Weigel is in a uniquely strong position to rule intelligently on questions of relevance, privilege and utility. To the extent respondents are concerned that the district

judge is not fully informed of their interests, the solution is for them to so fully inform the judge.

Petitioners also suspect the sincerity of respondents expressions of interests in not unduly consuming the district judge's time in view of the scope of discovery demanded by respondents and in view of the needlessly sweeping manner in which respondents have conducted this litigation. Despite the recent pronouncements of the federal courts in *Morrissey, supra; Scarpelli, supra;* and *Wolff v. McDonald, supra;* and the recent pronouncements of the California courts in *In re Prewitt, supra; In re Olson,* 37 Cal.App.3d 783, ..... Cal.Rptr. ..... (1974) (inmates' right to extensive discovery of the contents of his file); *In re Sturm,* ..... Cal.3d ....., ..... Cal.Rptr. ..... (1974) (inmates' right to written reasons for denial of parole), respondents have nevertheless proceeded in this action as if these cases did not exist. Respondents' complaint below was obviously drafted for the purpose of obtaining the maximum possible access to petitioners' records rather than for legitimate purposes of enabling the district judge to arrive at an informed decision. Respondents have taken every conceivable step to conduct this litigation in the most general possible manner. Respondents wish to litigate this action as a case of first impression as if *Morrissey* and the other rules and opinions generated by that case did not exist. Respondents are manifestly not interested in conserving judicial time.



## Conclusion

Neither time nor space permits a full item by item response to the assertions set forth in respondents' answer to the petition. Counsel for respondents are vigorous advocates who apparently believe their clients' interests, require them to proceed as they have. However, counsel greatly exaggerate their case and their position respecting discovery. Counsel have assumed an extreme position whereby they have demanded disclosure of virtually every piece of paper to which the Department of Corrections or the Adult Authority have access. Counsel's theory is that the scope of Rule 26(b) authorizes such demands because somewhere in that mass of paper there may be something to help their case.

In petitioners' view counsel's position requires judicial intervention. Were respondents litigating in a vacuum their position would be more tenable. However, the running start afforded respondents by the recent federal cases makes their demands for a comprehensive fishing expedition the less reasonable. In this action, respondents are demanding the right to plow the field for planting, even though the harvest has been reaped, milled and baked in other cases. Respondents should concentrate on icing the cake.

For all of the reasons set forth above, and for the reasons set forth in the petition and supplemental petition for writ of mandamus heretofore filed, peti-

tioners respectfully submit that the petition should be granted.

Dated: September 4, 1974

Evelle J. Younger, Attorney General
of the State of California

Jack R. Winkler, Chief Assistant
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Edward P. O'Brien
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W. Eric Collins
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/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General
Attorneys for Petitioners

KSM:pm

[Statement of Service Omitted in Printing]



In the United States Court of Appeals
for the Ninth Circuit

No. 74-2206

Henry W. Kerr, et al.,
Petitioners,

vs.

United States District Court, Northern District of California,
Respondent,

John Van Geldern, et al.,
Real Parties in Interest.

[Filed Sept. 20, 1974]

ORDER

Before: Merrill and Wright, Circuit Judges

It is ordered that the petition for writ of mandamus and response thereto be, by the clerk of this court, calendared for hearing.

It is further ordered that pending disposition of the petition the discovery order of the district court heretofore entered herein is stayed in so far as it requires petitioners to furnish to respondent (plaintiff below) the personnel files and internal governmental notes, memoranda, correspondence, etc., demanded in items Nos. 7, 14, 15, 18, 20, 21 and 22 of respondent's Request for Production of Documents.

/s/ Charles M. Merrill
/s/ Eugene A. Wright
Circuit Judges

Mocal 9/16/74

In the United States District Court
for the Northern District of California

[Filed Oct. 21, 1974]

[Caption Omitted in Printing]

NOTICE OF MOTION AND MOTION FOR ENFORCEMENT, CLARIFICATION AND SANCTIONS

This Court in its Order dated August 12, 1974 granted plantiffs, pursuant to the Federal Rules of Civil Procedure, the right to tape record parole consideration hearings and to view up to 200 inmate central files. A copy of the Court's Order is attached hereto as Exhibit A. Defendants have repeatedly violated this Order by censoring the central files, by their refusal to allow complete recording of conversations and deliberations regarding an inmate, refusing to allow photocopying of any documents of the central files and severely limiting the plaintiffs access to central files. Plaintiffs now ask this Court for enforcement and clarification of the August 12, 1974 Order and sanctions for its overt violation. Plaintiffs, by this motion, ask for five things: (1) that defendants not be permitted to "whitewash" the central files by removing materials prior to plaintiffs inspection, (2) that defendants not be permitted to censor tapings by turning off the recorder when the inmate is out of the room, (3) that defendants be instructed to allow plaintiffs to photocopy designated material in the central files, (4) that defendants not be permitted to deny plaintiffs access to central files merely because the parole hearing of that prisoner did not take place



in August, September or October, and (5) for appropriate remedies for defendants deliberate violation of this Court's Order, preferably by compensation in part for the time lost to plaintiffs by permitting plaintiffs to utilize supervised law students to inspect the central files.

I. BY REMOVING DOCUMENTS FROM THE CENTRAL FILES PRIOR TO INSPECTION BY PLAINTIFF'S COUNSEL, DEFENDANTS KNOWINGLY VIOLATE THE AUGUST 12, 1974 ORDER OF THIS COURT

In the face of the clear language of the Court's Order defendants and their agents have removed from the central files numerous documents prior to the plaintiffs inspection pursuant to the August 12, 1974 Order of this Court which provides that:

> (c) For purposes of this Order the term "central files" shall be deemed to mean *all* of those files, *wherever located,* pertaining to an inmate which are normally available to and considered by panel members *and* those actually used by panel members making a parole granting or denial determination. (Emphasis added)

On October 9, 1974, B. E. Bergesen, III, Counsel for plaintiff went to the Adult Authority offices in San Francisco to inspect central files of inmates pursuant to the August 12, 1974 Order of this Court. Mr. Bergesen was informed by an agent of defendant that some of the documents from some of the files had been removed prior to his inspection, whereupon a protest was made to defendants' agent and a telephone call placed to Counsel for defendants, Karl Mayer.

Mr. Bergesen was told by Mr. Mayer that he was required to follow the same procedure for inspecting central files as any inmate or other attorney under the department's so called *Olson* regulations.[1] (See Exhibit E, Affidavit of B. E. Bergesen, III).

It is not claimed by defendant that the materials are deleted from both the files inspected by plaintiffs and the files given to the panel members, nor that the removal of documents is pursuant to the August 12, 1974 Order of this Court.

These *Olson* regulations provide that a central file will be completely reviewed by a counselor to remove any confidential documents. (See Exhibit G). The language of this Court in the August 12, 1974 Order specifically provides that counsel for plaintiffs inspect the same materials in the central file as are normally available to the panel members. The language of this Court provided for the documents actually used by and those "available to" panel members in the deicison making process. No provision was made for plaintiffs to receive a "sanitized" version of these central files.

It should be noted that a non-legal prison employee is making the determination on what is to be removed from the central files. This prison official makes a list of reasons for the removal which is then given to the person requesting the inspection. Among the obscure reasons listed for removal is language which is indicative of probably being the type of document upon which a hearing determination is made; "letter of fear", "2 page letter expressing fear". Other lan-

[1]In Re *Olson* 112 Cal Rptr 579, 37 CA 3d 783 (1974)



guage is so vague that it is apparent that the person making the removal of the document was unsure whether in fact the document was of a confidential nature: "implied confidential". (See Exhibit F. Lists of documents withheld)

Defendants by their actions, are attempting to vitiate the intention of this Court to provide plaintiffs with evidence which is essential to their case.

## II. Defendants Refusal to Allow Recording of Conversations Previous to the Inmate Entering the Hearing Room Was In Direct Violation of This Courts Order.

This Court in its August 12, 1974 Order specifically directed that:

> Plaintiffs shall be responsible for operating said tape recorder and shall see to it that all aspects of hearing are recorded, including all deliberations and conversations between and among panel members relating to the hearings even when prisoners are not physically present at the hearings. Defendants shall cooperate to enable plaintiffs to comply with their obligations under this order.

In direct violation of this Court's Order, defendants during the hearings held at the California Medical Facility at Vacaville (hereinafter "Vacaville"), October 7, 8, 9, 10 and 11, 1974, refused any conversations or deliberations previous to the inmate entering the room to be recorded. (See Exhibit B, Affidavit of Kenneth Halperin)

During the period immediately before each inmate entered the hearing room, the hearing representative

openly discussed material factors concerning each inmate. The matters discussed often were determinative of the conclusions to later be reached.

Attached hereto as Exhibit C and Exhibit D are transcripts of hearings recorded under this Court's Order which clearly show the importance of recording this time period.

Contained in Exhibit C is a conversation regarding the inmate being "homicidal" and his family background.

In Exhibit D the hearing representatives discuss the crime for which an inmate was imprisoned, and both panel members personal relationship to that inmate's step-father.

Both transcripts reflect discussions of factors which have a measurable influence on the respective panel's determination of parole readiness. To lend proper perspective to the importance of such determinative "informal" discussions, it should be kept in mind that (1) each hearing panel consists of two members, (2) that one of the two members (the "interviewing" member) usually adopts the dominant role in interrogating each inmate, while (3) the other member (the "reviewing" member) reviews the file of the next prisoner to be dealt with (while trying to keep one ear on the proceedings in front of him). After each prisoner exits, the briefing given by the Reviewing Member to the Interviewing Member and the discussion ensuing, tends to be determinative in regards to the prisoner slated next.



During the hearings held in August and September, 1974, defendants made no objections to Plaintiffs recording of defendants conversations prior to each inmate entering the hearing room. During recent hearings held in October, 1974, at Vacaville, defendants suddenly refused to permit the making of such recordings. Plaintiffs were first notified of such refusal on October 8, 1974. At that time, Counsel for the plaintiffs, B. E. Bergesen, III, contacted Karl Mayer, Counsel for defendants and asked that defendants, pursuant to Order of this Court, cooperate to enable plaintiffs to comply with their obligations under such order. Mr. Mayer specifically refused to revoke his orders preventing such recordings being made.

Further, despite repeated efforts of plaintiff to comply with the August 12, 1974 Order of this Court, members of the panel did physically prevent such compliance. (See Exhibit B, Affidavit of Kenneth Halperin). In addition, based upon the orders of Mr. Mayer, Counsel for plaintiffs was shown "stripped" files, was not allowed to photocopy any documents from the inmates central files and was permitted to view only a restricted number of files. When these violations are viewed together, it becomes obvious that defendants are making a conscious effort to (1) thwart plaintiffs compliance with an Order of this Court, and (2) to disobey a direct, specific and unequivocal mandate of this Court.

### III. The Refusal of Defendants to Permit Counsel for Plaintiffs to Photocopy Documents In Inmate Central Files Violates the Order of This Court Made Pursuant to Federal Rule 34.

This Court's Order of August 12, 1974 was made under the authority of Rule 34 of the Federal Rules of Civil procedure which provides for a party "to inspect and copy" documents which constitute or contain matters within the scope of Rule 26(b). In violation of this Order defendants refused to allow counsel for plaintiffs to photocopy any of the documents contained therein. (See Exhibit E, Affidavit of B. E. Bergesen, III) As discussed previously, defendants arbitrarily are proceeding pursuant to their *Olson* regulations and not this Court's Order. Why would plaintiffs need an order from this Court of the *Olson* procedures were sufficient for discovery?

Plaintiffs believe that the Court in granting the Order permitting inspection intended that such inspection would necessarily encompass and include such acts, as photocopying, as would reasonably be necessary to render such inspection productive to its purpose.

The difficulty imposed by the defendants' violation in not allowing photocopying of certain documents can be characterized as effectively voiding any in depth study into the contents. Each such file of the 200 which the Court ordered defendants to allow plaintiffs to inspect are from 1" to 6" thick and contain from 25 to over 200 pages of documents. Common sense



indicates that anything more than a superficial glancing would require duplication for additional evaluation. The amount of time it would take plaintiffs counsel to sort through these thousands upon thousands of documents, make hand written copies of some and take notes on others is a task which itself could take months.

Plaintiffs simply ask this Court to confirm what is already defendants' obligation to allow plaintiffs counsel to make photocopies of this essential evidence.

### IV. Plaintiffs Request Clarification of the Court Order Permitting Inspection of Inmate Central Files.

Plaintiffs originally moved to inspect 1,000 (5% of the total number of such files) central files designated by plaintiffs. This Court in its August 12, 1974 Order granted a discovery right to plaintiffs to inspect up to 200 central files of inmates. Plaintiffs view this as a grant of access to some of the most essential evidence in the case. It was not the thrust of plaintiffs motion for this discovery to be so narrowly interpreted as to arbitrarily eliminate access to a majority of the files of inmates. As defendants now interpret this procedure, plaintiffs are being denied access the greatest majority of files by restricting plaintiffs to only those inmates files whose hearings have been recorded. Not only would it limit the *number* of files which can be inspected which has already been severly restricted, but it would wholly and arbitrarily restrict the times, types of prisoners and institutions which could be studied.

For example, it would mean that plaintiffs could not use as evidence (or even see) any material from any central files for a prisoner at Soledad, Folsom or any other institution in the California prison system other than San Quentin or Vacaville. It means that if plaintiffs desire to use witnesses from San Quentin or Vacaville who did not happen to have had their parole hearing held in August, September or October, it would be done without knowing what was in their central file but with the defendants having complete access to that file. If defendants interpretation was correct, it would mean that as any case came to the attention of plaintiffs which represented total arbitrariness on the part of the parole board, and which was crutial evidence for the Court, plaintiffs would not have any opportunity to even look at the central files. Plaintiffs are in contact with numerous prisoners who are members of plaintiff class. Plaintiffs would be forced into the position of relying exclusively on the memory of the prisoner during the brief ten minute parole hearing which he had when he was under extreme tension and would be deprived of the opportunity to present any documentary material from that prisoner's file unless by sheer happinstance the hearing had been recorded. In short, defendants interpretation is clearly illogical and unreasonable, and represents a wholly arbitrary and totally unjustifiable restriction of plaintiffs right and ability to present relevant material to the Court. It would also make it possible for prison officials to insure that certain central files would never be seen simply because the date of the inmates hearing had been postponed or he has been transferred to another institution.



Plaintiffs ask this Court to clarify that the August 12, 1974 Order was a grant of a discovery right and not a limitation by ordering defendants to allow plaintiffs counsel to inspect and copy central files for any member of the class they represent, up to a maximum of 200 files. Arguably, defendants have some administrative convenience interest in limiting the number of files inspected but they have no interest in restricting which files plaintiffs see, especially since defendants have access to all files and can pick and choose from over 20,000 files in preparing for trial.

## V. Remedies for Defendants Deliberate Violation of the August 12, 1974 Order of This Court

Plaintiffs do not desire punitive actions against defendants for their numerous violations of this Court's Order of August 12, 1974. Plaintiffs do wish to be placed on equal footing with defendants in the preparation for litigation.

Actions by defendants have wasted untold hours of counsel's time: (1) Counsel for plaintiffs B. E. Bergesen, III; Fay Stender and Sidney M. Wolinsky each wasted one-half day inspecting files at defendants offices, all of which has to be done over again because crucial material had been removed and no photocopying was allowed; (2) Law students have traveled to Vacaville to record the hearings only to have relevant deliberations unrecorded, (3) Mr. Bergesen and Mr. Wolinsky wasted time in trying to get Karl Mayer, Counsel for Defendants to voluntarily

comply with this Court's Order, and (4) Counsel have expended time in preparation of this Order. Moreover, plaintiffs discovery and trial preparation have been seriously delayed.

Accordingly, substantial fees would be warranted. Alternatively, plaintiffs ask only for the following assistance to make up for the wasted hours and inconvenience caused by defendant actions:

1. Plaintiffs or attorneys request that Certified Law Students or attorneys under the supervision of counsel for plaintiff be permitted to inspect and copy the inmate central files in addition to the counsel for plaintiffs.

2. That all photocopying of materials within the central files which is expected to be substantial, be done immediately after requests by plaintiffs and by and at the expense of defendants.

Dated: October 18, 1974

/s/ Sidney M. Wolinsky
Sidney M. Wolinsky
Counselor for Plaintiffs

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[Exhibit A]

[Exhibit A, the district Court's Order filed August 12, 1974, has been omitted in printing this Appendix and appears in the printed Petition For Writ of Certiorari, Appendix, pages xxix-xxxiii.]



[Exhibit B]

[Caption Omitted in Printing]

AFFIDAVIT OF KENNETH HALPERIN

State of California )
)ss
City and County of San Francisco)

I, Kenneth Halperin, being duly sworn, depose and say:

1. I am a citizen of the United States and a resident of the State of California.

2. I am a certified law student pursuant to Rules VI and VII of the Rules governing the Practical Training of Law Students under the supervision of attorney Sidney M. Wolinsky, a member in good standing of the State Bar of California.

3. I was responsible for operating the tape recorder and seeing to it that all aspects of the Adult Authority Parole Hearings held October 11, 1974 at the California Medical Facility at Vacaville were recorded, including all deliberations and conversations between and among parole members relating to the hearings even when prisoners were not physically present at the hearings, pursuant to the Order of this Court dated August 12, 1974, in the above-entitled action.

4. Said hearing was presided over by Mr. Bellachey and Dr. Forman, hearing representatives for the California Adult Authority.

5. Hearing Representatives Bellachey and Forman refused to allow me to record any portion of the proceedings prior to the inmate entering the room.

6. During this period immediately prior to the inmate entering the room, Hearing Representatives Bellachey and Forman would discuss the inmate whose hearing was next. This included a discussion of the crimes for which the inmates were convicted, disciplinary actions against the inmate, the psychological report, the fact that one or both of the Hearing Representatives had previously presided over a parole hearing at which the inmate appeared and the decision of that hearing, the persons the inmates wrote letters to, the inmates family and the relationship between the inmate and his girl friend. All of these discussions had a direct bearing upon the determination of whether to parole the inmates or not.

7. Hearing Representatives Bellachey and Forman based their refusal to allow this recording upon instructions received directly from Karl S. Mayer, Deputy Attorney General of the State of California, and counsel of defendant herein.

8. Hearing Representative Bellachey not only verbally refused to allow the recording previous to the inmate entering the hearing room, but physically refused by assuming the responsibility to turn the tape recorder on and off.

9. Hearing Representatives Bellachey and Forman had presided over similar hearings held at the California Medical Facility at Vacaville the 7, 8, 9, and 10 of October, 1974.



10. I have been told by the persons who ran the tape recorder at the hearing held October 7, 8, 9, and 10, 1974 at California Medical Facility at Vacaville that they were similarly refused to record the hearing previous to the inmate entering the room.

Dated: October 18, 1974

/s/ Kenneth Halperin
Kenneth Halperin

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[Jurat Omitted in Printing]

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[Exhibits C, D]

NOTICE OF SEALING OF DOCUMENT

By order dated December 3, 1974, the United States District Court, in *Van Geldern v. Kerr,* C-72-2088 SAW, USDC-ND Cal., ordered:

> "... those portions of the record in this proceeding which contain transcripts or partial transcripts of inmate hearings in which the identity of the subject inmate or any other inmate or former inmate is revealed shall be immediately sealed and such portions shall be open for inspection only by further order of this court."

Such a transcript would ordinarily be at this location in the record. It is deleted in accordance with the above order.

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General

[Exhibit E]

[Caption Omitted in Printing]

AFFIDAVIT OF B. E. BERGESEN, III

State of California )
) ss.
City and County of San Francisco )

I, B. E. Bergesen, III, being duly sworn, depose and say:

1. I am a member of the Bar of this Court and am one of the attorneys for plaintiffs herein.

2. On or about the evening of October 8, 1974, I was informed that the Adult Authority hearing representatives who were holding hearings at the California Medical Facility at Vacaville during the week of October 7 were prohibiting the taperecording of those portions of the hearings which were held prior to the inmate's entry into the hearing room. Because I believed this practice to be contrary to this Court's order ordering the taping of such hearings, I telephoned Deputy Attorney General Karl Mayer on October 9, 1974, to protest this practice. Mr. Mayer acknowledged that he had informed the hearing representatives that they did not have to permit the recording of such portions of those hearings. I informed him that I believed that was a violation of the Court's order, but he did not agree, and indicated that such portions of the hearings would continue to be unrecorded.

3. On October 9, 1974, I went to the Adult Authority offices in San Francisco to inspect the central files



of certain Department of Corrections inmates whose hearings had been recorded at Vacaville, pursuant to the order of this Court. As I began to inspect the files, I was informed by parole agent J. Simms that (1) I could not photocopy any of the documents and (2) some of the documents from some of the files had been removed prior to my inspection. I protested to him that this was not in accordance with the Court's order, whereupon he referred me to Karl Mayer, Esq. I telephoned Mr. Mayer to make my protest, but he took the position that we did not have the right to photocopy documents or to see all of the documents therein. I informed him that I was being required to follow the same procedure for inspecting central files as any inmate or other attorney under the Department's so-called *Olson* regulations, which gives any inmate and his attorney the right to see certain portions of the file pursuant to certain procedures. I told Mr. Mayer that our authority to view these files was not based upon the Department's *Olson* regulations, but rather the order of this Court pursuant to our motion for production of documents made under Rule 34, Federal Rules of Civil Procedure, which requires production for inspection *and* copying; and that the Court's order did not authorize the removal of any documents. However, Mr. Mayer took the position that the procedure the Adult Authority employees were following was proper, and he would not countermand it. Consequently, I was not permitted to photocopy any of the documents in any of the files, although I wished to do so.

4. Due to the files arriving at the Adult Authority offices in the afternoon (rather than at 9:00 o'clock in the morning as scheduled), I was able to examine only 7 of the 10 files sent down. In each case I signed a form stating that I had received a copy of that form, listing the documents which had been removed therefrom; however, due to a reported breakdown of the xerox machine when I went back to finish my inspection on October 11, 1974, I was not given any such copies. Mr. Simms promised to send them to me through the mail during the afternoon of October 11.

Dated: October 11, 1974.

/s/ B. E. Bergesen, III
B. E. Bergesen, III

[Jurat Omitted in Printing]



[Exhibit F]

CONFIDENTIAL CASE RECORDS

NAME: Daniels NUMBER: B-10646

Central File Examination Requested by:

☐ Person Named ☒ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

1—2 page document expressing fear.
1—1 page document expressing fear.
1—CII Rap Sheet for another person.
1—letter of fear.
1—letter of fear.
1—1 page form, implied confidential.
1—3 page form, implied confidential.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-07-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination

Signature Date

CONFIDENTIAL CASE RECORDS

NAME: Stewart NUMBER: B-10752

Central File Examination Requested by:

☐ Person Named ☒ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

C/P Information—Cum. Sum and CII Reports, Board Reports and P.&C.S. Report.
C/P Information—Cum. Sum.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-08-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

Signature Date



CONFIDENTIAL CASE RECORDS

NAME: TAFFOYA NUMBER: A-11122

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

1 Incident Report by R. S. Miller 2-27-72—Endanger life
Cum Sum of Ortiz a-57080.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-8-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

Signature Date

CONFIDENTIAL CASE RECORDS

NAME: SANTIAGO, Jack Benjamin

NUMBER: B-37644

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

District Attorney correspondence May 17, 1973
District Attorney correspondence April 11, 1973
CII Report accompanying visitor request dated 1-8-72
CII Report accompanying visitor request dated 2-19-72

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-8-74 | S.Q. |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| | Oct. 15, '74 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: ROSS, Johnnie Earl NUMBER: B-7207

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

District Attorney correspondence 4-18-74
Memorandum to Office of Attorney General 7-5-74
Crime Partner Records

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-7-74 | S.Q. |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| | |
|---|---|
| Signature | Date |

CONFIDENTIAL CASE RECORDS

NAME: WILLIAMS NUMBER: B-36149

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

Views of Judge and District attorney per 3046 P.C.
Contained in
Proceedings at sentence.
Paragraph in Probation Officer's report deleted in accordance with 3046 P.C.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-8-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| | Oct. 15, |
|---|---|
| Signature | Date |



[Exhibit G, a newspaper article in "San Quentin News," October 4, 1974, omitted in printing]

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[Proposed Order Omitted in Printing]

[Statement of Service Omitted in Printing]

[Title Page, Topical Index Omitted in Printing]

United States District Court
Northern District of California

(Filed October 24, 1974)

[Caption Omitted in Printing]

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT, CLARIFICATION AND SANCTIONS; AND DEFENDANTS' CROSS MOTIONS FOR SANCTIONS AND FOR TERMINATION OF COMPELLED RECORDATION OF PAROLE CONSIDERATION HEARINGS

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## PRELIMINARY STATEMENT

Plaintiffs' moving papers contend that defendants have violated the court's discovery order dated August 12, 1974,[1] by: (1) refusing to permit plaintiffs to photocopy the contents of inmate files; (2) refusing plaintiffs' access to the files of inmates whose hearings have not been recorded pursuant to the court's order; (3) not permitting recordation of parole consideration proceedings without knowledge of whether the inmate has consented; and (4) withholding from inspection a few confidential documents of little or no importance to plaintiff's case.

We point out below that:

(1) the order shortening the time within which to hear this motion was obtained on the basis of misinformation furnished by plaintiffs;

[1]This Court's discovery order dated August 12, 1974, is attached hereto as Appendix D.



(2) that plaintiffs' motion is made in bad faith and for the purpose of unduly consuming the time of the court and of defense counsel, and of harassing defendants;

(3) that plaintiffs' moving papers are virtually riddled with distortions of fact and half-truths;

(4) that plaintiffs' motion is a thinly veiled attempt to open new discovery despite the express order of the court that discovery was to be completed on August 15, 1974;

(5) that the court's order expressly limits plaintiffs' inspection of inmates' files to the files "of those inmates whose hearings have been tape-recorded in accordance with this Court's order and who have not objected to such inspection;"

(6) that the court's order makes no reference to the photocopying of any of the contents of the files to be inspected;

(7) that most serious violations of the express provisions of the court's order of August 12, 1974, have been committed under the auspices of counsel for plaintiffs;

(8) that plaintiffs' counsel's cavalier regard of the discovery rights accorded them should call for a re-evaluation of their capacity to adequately protect the interest of the large class of persons they have claimed to represent;

(9) that the court's continuing order for recordation of parole consideration hearings is based on misinformation furnished by plaintiffs and should be terminated.

## Argument

### I

### Plaintiffs' Application for an Order Shortening Time Is Based on Misinformation.

On the basis of Mr. Wolinsky's personal representation that plaintiffs' moving papers would be hand-delivered the afternoon of Friday, October 18, 1974, counsel for defendants agreed to an order shortening the time within which to hear plaintiffs' motion to Thursday, October 24, 1974. (Certificate of Counsel, Karl S. Mayer, paragraph 2; Appendix I, herein.)

Mr. Wolinsky did not honor his representation and did not mention the representation in his application for an order shortening time. Although the application and order are both dated October 18, 1974, as are the moving papers, none of these documents were hand-delivered on that date. The Attorney General's Office is one and one-half blocks from Mr. Wolinsky's office and just across the street from the federal courthouse where the order was obtained Friday afternoon (Appendix I, paragraphs 3, 5).

Compliance with Mr. Wolinsky's representation by him, or by his designee, would have required less than five minutes time. Mr. Wolinsky's failure to honor his representation purposefully deprived defendants of two and one-half of the six days which otherwise would have been available to prepare a response to plaintiffs' motion. Mr. Wolinsky's moving papers were *mailed* on October 18, 1974, and received on Monday, October 21, 1974.



Mr. Wolinsky's motion for an order shortening time, and his certificate of counsel, thus misinform the court. Indeed, the last paragraph of Mr. Wolinsky's certificate is bold enough to state, despite his representations that hand-delivery would be made, that the moving papers "will be served" October 18, 1974, when Mr. Wolinsky well knew the papers would only be mailed that date and could not be received by defendants' counsel until at least Monday, October 21, 1974. We are sure the court did not understand Mr. Wolinsky's use of the word "served" to mean "mailed."

Karl Mayer, counsel for defendants, waited in his office until six o'clock the afternoon of Friday, October 18, 1974, for the hand-delivery Mr. Wolinsky represented would occur. There was no such delivery (Appendix I, paragraph ).

The fourth numbered paragraph of Mr. Wolinsky's certificate of counsel claims that defendants have imposed severe restrictions on plaintiffs' access to inmates' central files. This is a knowledgeable distortion of the facts. As is more fully discussed in Argument II below, defendants have in fact gone to great lengths to accommodate and convenience plaintiffs' counsel with respect to their inspection of inmate files. Plaintiffs' counsel have been permitted to designate the date and time for examination of the inmate files. All the files within the purview of the court's order which have been requested by counsel have in fact been furnished. A few confidential documents of little or no importance to plaintiffs' case (such as documents relating to a particular inmate's crime

partners) have been withheld, as a *preliminary* matter, from the files furnished for inspection. Plaintiffs' counsel were furnished a writing describing each of the documents withheld and the reason for their being withheld. Plaintiffs' counsel were invited to designate which of these documents were of interest to their case and to contact defense counsel to attempt to resolve the matter without court intervention. No such attempt has been made by plaintiffs' counsel (Appendix I, paragraph 12; Appendix B).

The fourth paragraph of Mr. Wolinsky's certificate of counsel also states that defendants have violated the court's order of August 12, 1974, by refusing to allow photocopying of any documents in the files inspected pursuant to that order. This is a knowledgeable misrepresentation of the terms of the court's order. The court's order makes no reference whatsoever to photocopying any of the contents of any of the files to be examined by counsel for plaintiffs. This point is more fully discussed in Argument IV below.

The sixth numbered paragraph of Mr. Wolinsky's certificate of counsel states that valuable time will be lost unless the plaintiffs' motion is heard within the shortened time requested by plaintiffs. This representation is belied by the circumstance that, although recordation of inmates' parole consideration hearings began on August 5, 1974, and although the court's order permits inspection of the files of inmates whose hearings have been recorded, no attempt was made by plaintiffs' counsel to inspect any file for two months until October 1974.



For the reasons set forth above, and for the reasons which appear in our arguments below, plaintiffs' not only have no valid basis for obtaining an order shortening the time within which to hear their motion, plaintiffs have no valid basis for the motion. The application for an order shortening time, and the text of plaintiffs' motion rely not on facts or legal argument, but on emotionally charged terms, such as defendants' "continuing refusal to permit plaintiffs to fulfill their obligation to this Court;" defendants' "severe restrictions" on plaintiffs' access to central files; plaintiffs' scheduling has been "severely disrupted;" "defendants' volative actions . . . will impose harsh results" on plaintiffs' preparation for trial. Plaintiffs' use of such terms lacks candor, invites the court to act on the basis of emotion rather than objective justice, and knowledgeably distorts the fair import of the circumstances.

## II

### Preliminary Removal of Certain Documents From the Files Inspected by Plaintiffs' Counsel Is Not a Knowing Violation of the Court's Order.

A few confidential documents, unimportant to plaintiffs' case have been withheld, as a preliminary matter, from the files furnished plaintiffs' counsel for inspection pursuant to the court's order of August 12, 1974. These documents were withheld because the Department of Corrections regards them as confidential. Plaintiffs' counsel was notified in writing of each of the documents withheld and of the reasons of

their being withheld. Attached hereto as *Appendix A* are copies of these notifications.

By letter dated October 15, 1974, Mr. Sidney M. Wolinsky, counsel for plaintiffs, was advised in writing that this withholding of documents was a preliminary, and not irrevocable, step taken for the purpose of preserving, if reasonably possible, the confidentiality of these documents. A copy of this letter is attached hereto as *Appendix B*. The letter reiterates an invitation to plaintiffs' counsel to advise defense counsel whether any of the items withheld are of specific interest to plaintiffs in the presentation of their case, and states that upon such notification the withholding of the documents would be reevaluated in light of counsel's expressions of interest in them. Plaintiffs' counsel has made no effort to follow this reasonable course to resolve the matter without the necessity of court intervention.

The number of documents withheld is very few, and documents have been withheld only from some of the files furnished. The documents relate most frequently to information respecting the crime partner of the inmate whose file is to be examined and would have no bearing on parole consideration of the inmate. It should be noted that counsel for plaintiffs have tape-recordings of the full parole consideration hearings for each of the inmates whose files they wish to inspect so that counsel should have no problem discerning whether particular documents played any role in the panel's decision respecting whether to grant parole or, on the other hand, discerning whether the documents are patently irrelevant.



Defendants feel this procedure is not a knowing violation of the court's order because, in defendants' view, this aspect of inspection of the inmates' files was not duly considered by counsel or by the court and that the above position adopted by defendants is clearly reasonable under the circumstances. Defendants fail to perceive any reason why plaintiffs' counsel, or the court, would want to disclose confidential documents which are of no importance to plaintiffs' presentation of their claim that certain process is due at state parole consideration hearings.

Plaintiffs' moving papers flaunt the "clear language of the court's order of August 12, 1974," although:

(1) plaintiffs' demand that the court's order requires they be permitted to photocopy any documents contained in the files to be inspected despite the fact that the court's order makes no mention or provision for such photocopying, and despite the circumstance that to permit such photocopying would undermine the court's restriction on access to the contents of inmates' files to plaintiffs' counsel and only plaintiffs' counsel.

(2) plaintiffs' demand a right to inspect the files of inmates who have not appeared for parole consideration hearings, been recorded, and consented to counsel's inspections of their files, although the court's order clearly and expressly limits inspection to "the central files of those inmates whose hearings have been tape-recorded in accordance with this Court's order and who have not objected to such inpsection;"

(3) despite the language in the court's order that "plaintiffs sha[illegible] be responsible for operating said tape recorder a[illegible] shall see to it that all aspects of hearings are recorded," plaintiffs have failed to make any recording of sixty-eight hearings (including hearings conducted on October 17, 1974, at Vacaville, and hearings conducted on September 4, 1974, at Vacaville, and on October 21, 1974, and October 23, 1974, at San Quentin) (Appendix I, paragraph 9);

(4) despite the above quoted portion of the court's order, casting an affirmative duty on plaintiffs to record all aspects of hearings, plaintiffs have failed to reliable record numerous hearings conducted at San Quentin during the period of August 5 through 10, 1974. This is admitted by counsel for plaintiffs in "Plaintiffs' Answer to Defendants' Motion for an Order Terminating Recordation of Adult Authority Hearings, Plaintiffs' Memorandum of Points and Authorities and Supporting Affidavits" filed in open court on August 29, 1974, and attached hereto as *Appendix C*.

During the week preceding August 5, 1974, I had telephone conversations with Mr. Wolinsky respecting the tape recording devices obtained by him for the purpose of recording Adult Authority parole consideration hearings pursuant to the court's order. Mr. Wolinsky personally assured me that he and his staff had personally tested the machines to be used by placing the machines on a table and speaking at various volumes and at various distances from the record-



ing device, and he personally assured me that the machines were capable of "picking up a whisper across the room." *Appendix I*, paragraph 15. In view of Mr. Wolinsky's personal assurances, there was simply no excuse for the apparent large number of defective recordings made at San Quentin during the month of August 1974.

Plaintiffs have throughout asserted that this aspect of their discovery demands were critical to their case, yet plaintiffs have apparently treated cavalierly their obligations under the court's order to in fact make recordings and make them accurately.

The problems thus created by the conduct of plaintiffs' counsel are discussed in more detail in Arguments VI and VII below. It suffices to note here that plaintiffs, and not defendants, have been responsible for the most flagrant abuse of the affirmative obligations cast by the clear text of the court's order of August 12, 1974.

## III

### The Matter Of Recording Conversations Among Panel Members Which Occur Prior To An Inmate's Entry Into the Hearing Room Was Resolved During Discussions In Open Court Before Plaintiffs' Motion Was Filed.

Plaintiffs' motion makes much of the circumstance that at a few parole consideration hearings the panel members had brief conversations respecting a matter about to be heard which occurred before the inmate entered the hearing room and before the panel mem-

bers knew whether the inmate had consented to a recordation of his parole consideration hearing. This matter was discussed and resolved during discussions in open court on Thursday, October 17, 1974, before plaintiffs' motion was filed.

We note that plaintiffs have cited only *two* instances where this has occurred although 750 parole consideration hearings have been (or should have been) recorded. This is far fewer than the sixty-eight hearings which respect to which no recording at all has been made because of plaintiffs' failure, despite the court's order, to show up and make any recording.

Defendants object to the court's consideration of the two "transcripts" attached to plaintiffs' moving papers. Defendants object upon the grounds that the transcriber is not identified; the transcript is not verified; the transcript, on its face, is incomplete; the transcript is not the best evidence of what occurred during the hearing; and upon the ground that the tape-recording is better evidence of what occurred at the hearing.

Defendants also object to plaintiffs making these transcripts public papers by filing them as exhibits with their moving papers, and suggest that the transcripts be ordered sealed. There is no reason to suspect that the inmates whose parole consideration hearings have been recorded have knowledgeably consented to transcripts of their proceedings becoming public documents available for examination by any person.

In accordance with the discussions on the points in open court on Thursday, October 17, 1974, counsel for



defendants has communicated to the Adult Authority, and to the personnel at San Quention and at Vacaville the requirement of the court's order that any discussions among panel members or statements made by them respecting an inmate whose parole is to be considered by them must be recorded even if such statements or discussions are made prior to the actual commencement of the hearing proceeding and prior to the entry of the inmate into the hearing room unless the panel members have actually been informed that the inmate has refused to consent to recordation of his proceedings (Appendix I, paragraph 11).

## IV

### The Court's Order Makes No Provision For, Or Reference To, Photocopying Any Of The Documents In Any Of The Files Furnished For Inspection Pursuant To The Order.

Plaintiffs' moving papers contend that defendants have violated the court's order of August 12, 1974, by not allowing plaintiffs to copy any document they wish from the contents of the files furnished for their inspection pursuant to the court's order. This contention is raised in deliberate bad faith and is no more than a thinly veiled attempt to reopen new discovery demands despite this Court's order that discovery be completed August 15, 1974.

The court's order of August 12, 1974, Appendix D herein, makes no provision for photocopying and makes no reference to photocopying of any of the contents of any of the files furnished plaintiffs for inspection pursuant to that order.

The findings and recommendations of the magistrate, filed June 11, 1974, while recommending that plaintiffs be furnished access to the files of up to 200 inmates for inspection, also makes no reference to and no provision for photocopying of any of the contents of any of the files.

Plaintiffs' motion to compel disclosure of inmate files for inspection by plaintiffs makes no mention of and no request for a right to photocopy any of the contents of any of the files demanded.

Plaintiffs' original request, by letter dated November 5, 1973, for a right to inspect every twentieth inmate's file also makes no reference whatsoever to any right or interest in photocopying any of the contents of any of the files requested.

Rule 34, Federal Rules of Civil Procedure, does authorize a party to serve on another party a *request* to permit the inspection and copying of designated documents. Although plaintiffs have served requests to inspect documents, no request to copy documents has been served. Plaintiffs therefore never invoked that provision of Rule 34 with respect to the files of inmates, and have never requested the court to invoke that section.

Plaintiffs' request in their moving papers, therefore, misrepresents the meaning of this Court's order of August 12, 1974, misrepresents their position with respect to this aspect of plaintiffs' discovery in this action, and falsely charges defendants with violating a provision of an order of the court which does not exist and which was never contemplated either by plaintiffs



or by the court. On this basis plaintiffs demand sanctions for defendants violation of the court's order, demand that they be permitted to photocopy any documents from any of the files they inspect pursuant to the court's order, and demand that all of this be done at defendants' expense. This is at best irresponsible advocacy.

Servicing plaintiffs' mere right to inspect the files has and will continue to consume a very significant amount of time of the staff of the Department of Corrections. Plaintiffs have so far requested an examination of twenty-eight inmate files. A copy of plaintiffs' request is attached as *Appendix E.* Servicing this request required fourteen man-hours on the part of staff of the Department of Corrections (Appendix I, paragraph 7b; *Appendix II).*

With respect to photocopying, Mr. Jerry Simms, a Department of Corrections staff member who assisted plaintiffs' counsel in inspecting the files, has informed counsel for defendants that Mr. Bergesen designated documents he wished copied by using paper clips from fifteen to thirty separate documents in each of the files inspected by him *(Appendix I,* paragraph 7c). Assuming plaintiffs' counsel would want photocopies made of fifteen documents for each of the files to be inspected by them, Mr. Simms estimates that one-half hour's time per file would be consumed in photocopying the requested documents *(Appendix I,* paragraph 7d). This would amount to a total of at least one hundred man-hours for photocopying documents demanded from the 200 hundred files, and would involve copy-

ing from 3,000 to 6,000 separate documents. This is indeed an onerous discovery demand to be raised in the first instance by plaintiffs in their demands for sanctions for defendants alleged violations of a provision of a court order which does not exist. This request should be rejected and counsel should be rebuked for advancing it.

## V

### The Court's Order Expressly Restricts Inspection to the Files of Inmates Whose Hearings Have Been Recorded.

No clarification of this Court's order is required with respect to what inmate files are subject to inspection pursuant to the provisions of the court order.

The text of the court's order of August 12, 1974, *Appendix D,* was the product of painstaking discussions in open court at the end of July, 1974, when the court, defense counsel, and plaintiffs' went over the order word-by-word. On page three, lines 11 through 16, the order states:

> "( B) Plaintiffs' counsel shall be permitted to select for their inspection the central files of those inmates whose hearings have been tape-recorded in accordance with this Court's Order (up to a maximum of 200 such files) and who have not objected to such inspection."

This portion of the text of the court's order was discussed extensively in open court and is the result of a compromise offer suggested by counsel for defendants and readily concurred in by plaintiffs' counsel, Mr. Sidney Wolinsky. Defense counsel's purpose



in suggesting that the files to be examined be the files of inmates whose parole consideration hearings have been recorded was that this would most reasonably accommodate plaintiffs' avowed interests in parole consideration hearings. This is also why the text of the court's order goes on further to define central files to include the files considered by parole consideration panels. This language was suggested by Mr. Wolinsky. Thus, plaintiffs would have a recording of the hearing and access to the records actually considered by the panel to most fully inform plaintiffs of what is considered by the panel and how it is considered. Indeed, this aspect of the court's order prompted the court to observe that if an inmate refused to consent to a recording his file would not be subject to inspection under the court order. Mr. Wolinsky expressed his understanding of this and his agreement with it. If there is any question in the court's mind, or in the mind of Mr. Wolinsky as counsel for plaintiff, then defendants suggest that the reporter's transcript of those proceedings be prepared and examined.

Plaintiffs' moving papers make no reference whatsoever to the proceedings which resulted in the text of the court's order, nor do plaintiffs' moving papers remind the court of the purposeful colloquy just discussed above.

If plaintiffs wish the court to reconsider an express ruling heretofore rendered by it, they should say so with candor and meet the question forthrightly. This plaintiffs have not done. Plaintiffs' moving papers

are a vague attempt to misinform and to hoodwink the court into taking an action directly contrary to an earlier action without also informing the court of its earlier action.

Plaintiffs' contention does not even refer the court to its own language in its order dated August 12, 1974. Instead, plaintiffs' argumentatively state:

> "In short, defendants *interpretation* is clearly illogical and unreasonable and represents a wholly arbitrary and totally unjustifiable restriction of plaintiffs' right and ability to present relevant material to the court" (Plaintiffs' "Notice of Motion and Motion for Enforcement, Clarification and Sanctions," p. 8:9-12).

As noted above, defendants' so-called "interpretation" is no more than a simple reading of the express and clear language of the court's order; drafted in open court in the presence of this counsel, Mr. Sidney Wolinsky; and remarked upon by the court for the meaning advanced by defendants and expressly understood by Mr. Wolinsky at that time.

For the above, reasons, this discovery demand of plaintiffs is advanced in bad faith for the purpose of harassing defendants, and unreasonably and unduly consumes this Court's time. Counsel should be rebuked for advancing this contention and for the manner in which it is advanced.



## VI

### This Court Should Reevaluate The Ability of Plaintiffs' Counsel to Adequately Represent The Class of Plaintiffs.

By order dated August 19, 1974, this Court filed its order determining that plaintiffs' action is maintainable as a class action on behalf of all adult male felons, who now are, as well all adult male felons who in the future will be, in the custody of the California Department of Corrections whether confined in an institution or on parole. This order casts on the court, and on the plaintiffs' counsel an especially heavy burden to responsibly litigate the rights advanced in the action. Counsel for plaintiffs has either not taken these responsibilities seriously or is unable to fully execute them.

Plaintiff's counsel has repeatedly urged that recordings of Adult Authority parole consideration hearings are crucial to plaintiffs' case. Yet, plaintiffs' counsel failed to reliably record numerous such hearings at San Quentin the week of August 5 thorugh 10, 1974. Counsel's reasons for this ineptness are unacceptable in view of Mr. Wolinsky's personal assurances that the equipment had been tested by him and by his staff and was found to be of exceptional quality and sensitiveness.

Plaintiffs' never even bothered to record sixty-eight hearings conducted at Vacaville on October 17, 1974, and at San Quentin on September 4, 1974, October 21, 1974, and October 23, 1974.

In the two and one-half months which have transpired from the time the recording of Adult Authority hearings commenced, counsel for plaintiffs have examined only twenty-two inmate files. A copy of the first and only request by plaintiffs' counsel for such examination is attached hereto as *Appendix E*. There are presently seven attorneys of record for plaintiffs in this action. The past two and one-half months only three of the seven attorneys (Mr. Bergesen, Mr. Wolsinky and Mrs. Stender) have made any attempt to examine inmate files, and these three attorneys have spent a total of two attorney-days doing so. The magistrate's findings and recommendations filed June 11, 1974, characterize plaintiffs' counsel's inspection of inmates files as "perhaps, the most relevant matters that might tend to support the plaintiffs' claims . . ." (Order, p. 6:30-31). Plaintiffs' counsel's apparent disagreement with this proposition is expressed by the leisurely pace with which they are proceeding to examine the files. At counsel's present rate it will take nearly two years to complete the inspection of 200 files.

The present spurious motion advanced by counsel for plaintiffs confesses more a neglect to have earlier advanced various discovery demands than it does vigorous advocacy on behalf of the class they purport to represent. Counsel claims that their examination of inmate files pursuant to the court's order is restricted to the point of meaninglessness absent a right to photocopy any and all documents that may be contained in such files. Yet, counsel never before advanced any request for a right to photocopy the documents as part of their right to inspect the files.



With rare exception, plaintiffs' discovery has been by way of a shotgun approach and has indicated little focusing on the real issues presented by the complaint and answer. While plaintiffs' counsel has purported to focus on discovery relating to parole granting and term-fixing proceedings, virtually no discovery has been advanced by them with respect to parole revocation revocation proceedings, term refixing proceedings, parole rescission proceedings or disciplinary proceedings. Yet all of these other proceedings are advanced in the complaint on behalf of the class counsel purports to represent.

With a then pending trial date of December 2, 1974, plaintiffs filed on August 22, 1974, "Plaintiffs' Certificate of Readiness (Rule 103)." This document declared "plaintiffs are ready for pre-trial and trial." Yet, in answer to Interrogatory No. 39 of defendants' first set of interrogatories (Answers dated August 14, 1974, and filed on or about September 10, 1974) each of the named plaintiffs state that most discovery has not been completed and will not be completed until some time after August 15; that "plaintiffs have not decided upon a particular trial strategy or foremat and do not intend to until sometime after discovery has been completed;" that "plaintiffs have not completed either their non-discovery investigative work nor their interviews with prospective witnesses, many of whom will be identified only after plaintiffs' counsel are able to inspect various inmates' central files;"

that plaintiffs have thus far concentrated principally on discovery, rather than upon preparing their own affirmative case, as a result of which it is anticipated that many documents which will be offered at trial cannot be identified at this time." This statement was made by plaintiffs approximately twenty two months after the complaint had been filed, but only three months prior to the commencement of trial.

Despite the importance of inspecting inmates' files, as asserted in plaintiffs' answers to defendants' interrogatories above, counsel for plaintiffs have proceeded with great leisurelyness since the date of that declaration. It is quite clear that counsel for plaintiffs have been saved by *defendants'* motion for additional time to prepare for pre-trial and trial. This motion was filed August 29, 1974, and granted.

In view of the above circumstances, defendants urge that the court should be concerned whether present counsel for plaintiffs are in fact able to adequately represent the significant interests of the class of persons they purport to represent in this action.

## VII

### Sanctions Should Be Imposed on Counsel for Plaintiffs in the Interests of Justice and as Authorized by the Provisions of Rule 37.

For the reasons which follow defendants respectfully request that the court order counsel for plaintiffs to report to defendants and to the court the continuing status and details of their monitoring of the parole consideration hearings conducted at San



Quentin and at Vacaville. Defendants also request that, pursuant to Rule 37, Federal Rules of Civil Procedure, plaintiffs be ordered to pay to defendants reasonable fees and expenses incurred in opposing plaintiffs' spurious motion.

By their failure to accurately record numerous parole consideration hearings conducted at San Quentin the week of August 5-10, 1974, by their failure to appear to record the fifteen hearings conducted at Vacaville on October 17, 1974, and by their failure to appear to record fifty-three hearings conducted at San Quentin on September 4, 1974, October 21, 1974, and on October 23, 1974, plaintiffs have cast grave uncertainty over the reliability of the recordings they were ordered to make by the court's order of August 12, 1974.

By letter dated October 21, 1974, a copy of which is attached hereto as *Appendix F*, counsel for defendants requested counsel for plaintiffs to promptly furnish in writing the following information with respect to each parole consideration hearing recorded pursuant to the district court's order dated August 12, 1974:

(1) the name and prison number of each inmate whose hearing has been recorded;

(2) the name of the institution at which the recording was made;

(3) the date on which the recording was made;

(4) the names of panel members, the machine operator (including the name and occupation of

the machine operator if not a law student), and of any other persons present at the hearing being recorded.

In view of plaintiffs' neglect in monitoring these recordings, in view of their asserted crucial importance to this litigation, and in view of the affirmative duty cast on plaintiffs by the court's order to in fact record all parole consideration hearings at Vacaville and at San Quentin, defendants respectfully request that plaintiffs be *ordered* to furnish the above information to counsel for defendants and to the court for all hearings conducted pursuant to the court's order.

Because plaintiffs' present motion is spurious and not well taken, because it unduly consumes the time of the court and of defense counsel, and because it has served only to harass defendants, defendants respectfully request that pursuant to Rule 37(a)(4), defendants' reasonable expenses, including attorneys expenses, incurred in opposing plaintiffs' motion be awarded defendants. A reasonable amount for such expenses, including attorney and secretarial time in drafting and typing these opposing papers, and attorney time appearing in court to oppose the motion is $750.



## VIII

### The Compelled Recordation of Adult Authority Parole Consideration Hearings Should Be Terminated.

(1) *The number of hearings monitored by plaintiffs exceeds 1,000.*

As of October 17, 1974, 750 Adult Authority parole consideration hearings have been recorded. 160 other hearings were attended by twenty-four attorneys who were designated by plaintiffs and who were allowed to take notes. For the period October 21, through October 24, 1974, today's date, about 196 additional parole consideration hearings will have been conducted at San Quentin. This brings to well over 900 the number of hearings recorded, and to well over 1,000 the number of hearings monitored in their entirety by persons designated by plaintiffs.

Defendants submit that over 1,000 hearings affords plaintiffs an adequate sample.

(2) *The increased rate of parole grants is not attributable to plaintiffs' monitoring;*

Beginning months *before* plaintiffs' monitored parole consideration hearings, the rate of parole grants has increased significantly *on a state-wide basis.* Attached as *Appendix G* is a memorandum dated October 22, 1974, from Vida Ryan, senior statistician for the California Department of Corrections, which sets forth the percentage of paroles granted male felons state-wide for each month of January through September, 1974.

Plaintiffs' claim that the percentage of parole grants has increased because plaintiffs are making recordings of parole consideration hearings. This claim is groundless. The claim is based on a July 1974 article in the inmate newspaper, "San Quentin News," (see *Appendix C* attached hereto). This article reports the percentage of parole grants at San Quentin for the month of July 1974. This was before the recordings began. Also, the reported percentage for July 1974 (about thirty percent) is in line with the state-wide percentage for that month (about twenty-eight percent). See *Appendix G.*

(3) *Plaintiffs' alleged need for more recordings is belied by their not bothering to show up on four occasions, resulting in fifty-five hearings not being recorded.*

A. Because of plaintiffs' failure to attend hearings, despite the court's order, the following number of hearings were *not* recorded on the indicated dates (Certificate of Counsel, Karl S. Mayer, paragraph 9, attached as *Appendix I*):

(1) September 4, 1974—San Quentin—25 hearings;

(2) October 17, 1974—Vacaville—15 hearings;

(3) October 21, 1974 — San Quentin — 11 hearings;

(4) October 23, 1974 — San Quentin — 17 hearings;

Total—68 hearings



B. Before the hearings began plaintiffs informed the court they could proceed with the action *without any* recording, as recommended in the magistrate's findings and recommendations filed June 11, 1974. A copy of plaintiffs' letter to the court is attached as *Appendix H.*

For the above reasons, and for the reasons set forth in defendants' moving papers as listed in the conclusion hereof, and in defendants' Adult Authority hearings filed August 26, 1974, September 18, 1974, and October 18, 1974, defendants respectfully submit that the compelled recordation of Adult Authority parole consideration hearings be terminated.

## Conclusion

For all of the reasons set forth above, for the reasons set forth in "Defendants' Response in opposition to Plaintiffs' Motion to Compel Discovery," filed June 3, 1974; for the reasons set forth in defendants "Notice of Intent to Seek Review of Magistrate's Decision and Statement of Objections," filed June 17, 1974, and for the reasons set forth in defendants "Request for Review of Magistrate's Findings and Recommendations," filed June 24, 1974, defendants' respectfully request that plaintiffs' motion be denied in its entirety, that plaintiffs be ordered to report to defendants and to the court the status and details of their monitoring of parole consideration hearings pursuant to the court's order, that compelled recordation of parole consideration hearings be terminated forthwith, and that plaintiffs be ordered to pay to defendants

reasonable fees and expenses in the amount of $750 incurred in opposing plaintiffs' motion. A proposed order is attached to these papers.

DATED: OCTOBER 24, 1974

Evelle J. Younger,
Attorney General of the
State of California

Jack R. Winkler,
Chief Assistant Attorney
General—Criminal Division

Edward P. O'Brien
Assistant Attorney General

John T. Murphy
Deputy Attorney General

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General
Attorneys for Defendants

KSM:pm

[Statement of Service Omitted in Printing]

[Proposed Order Omitted in Printing]



[Appendix A]

(Letterhead of State of California—
Human Relations Agency, Department of Corrections,
Parole and Community Services Division,
San Francisco, California 94111)

October 16, 1974

Mr. Karl Mayer
Deputy Attorney General
Dept. of Justice
Room #6000
State Building
455 Golden Gate Ave.
San Francisco, Calif. 94102

Re: File Review by Attorneys

Pursuant to a Federal Court Order the following files have been reviewed by attorneys at Region II Headquarters, San Francisco.

Listed are the names of the attorneys who reviewed each file and the amount of time expended in the review:

*10-9-74*—Review of below named cases monitored by J. Simms.

File review by Atty. Bergensen.

| | | | |
|---|---|---|---|
| CORWIN, Bruce | B-19655 | 2:00 p.m. to | 3:05 p.m. |
| ELLIS, Charles | B-4113 | 3:00 p.m. to | 3:30 p.m. |
| BEASLEY, Raymond | B-56290 | 3:48 p.m. to | 4:14 p.m. |

| | | |
|---|---|---|
| SMITH, James | B-57431 | 4:15 p.m. to 4:28 p.m. |
| BOLING, Ted | A-78846 | 4:28 p.m. to 4:50 p.m. |

*10-11-74*

| | | |
|---|---|---|
| MARTIN, William | B-56926 | 12:25 p.m. to 12:30 p.m. |
| THEUS, Jimmy | A-93228 | 12:38 p.m. to 2:05 p.m. |

*10-15-74*—Review of below named cases was monitored by D. E. Brown and J. Simms.

File Review by Attorney's Wolinsky & Stender.

| | | |
|---|---|---|
| POLK, Lonny | B-9501 | 9:20 a.m. to 10:00 a.m. |
| BURNS, Monroe | B-33714 | 9:50 a.m. to 10:23 a.m. |
| DODSON, John | B-49942 | 10:00 a.m. to 10:15 a.m. |
| BEASLEY, Raymond | B-56290 | 10:10 a.m. to 10:23 a.m. |
| WILLIAMS | B-47649 | 11:05 a.m. to 11:25 a.m. |
| SANTIAGO | B-37644 | 10:14 a.m. to 10:50 a.m. |
| SCOTT | B-14449 | 10:20 a.m. to 10:50 a.m. |
| WILLIAM | B-36149 | 10:40 a.m. to 11:05 a.m. |
| BOWSER | B-50543 | 10:50 a.m. to 11:05 a.m. |
| DANIELS | B-10646 | 11:05 a.m. to 11:35 a.m. |
| STEWART | B-10752 | 11:25 a.m. to 11:55 a.m. |
| ROSS | B-7207 | 11:50 a.m. to 11:59 a.m. |
| TAFFOYA | A-11122 | 11:55 a.m. to 12:15 p.m. |
| SNOW | B-19205 | 11:59 a.m. to 12:10 p.m. |
| PECK | B-49152 | 12:10 p.m. to 12:16 p.m. |
| SMOOT | A-54010 | 11:35 a.m. to 11:45 a.m. |



Review by attorneys of the preceding case files and the monitoring of this review by Region II parole staff has involved the expenditure of fourteen (14) man hours.

E. Reimer
Chief

/s/ D. E. Brown
D. E. Brown
Assoc. Parole Revocation Coordinator

ER:DEB:ms

(Letterhead of State of California—Health and Welfare Agency—Department of Corrections)

MEMORANDUM

Date: October 4, 1974
File No.:
Subject: File Review by Attorneys

To: Mr. C. Arnold
Records Officer III
Department of Corrections
Ferry Building, Room 2040
San Francisco, California 94111

From: California Medical Facility, Vacaville 95688

We are transmitting herewith the Central Files of the below listed inmates, per instructions of Mr. M. Christiansen, Departmental Legal Counsel, for attorney review on Wednesday, October 9, 1974. All files have been screened in compliance

with IR-1-08, and the confidential files have been retained at CMF. The Central Files should be expeditiously returned to CMF upon completion of attorney review.

| | |
|---|---|
| B-9501 | POLK, Lonny |
| B-4113 | ELLIS, Charles |
| B-33714 | BURNS, Monroe |
| B-56926 | MARTIN, William |
| A-93228 | THEUS, Jimmy |
| B-57431 | SMITH, James |
| B-49942 | DODSON, John |
| A-78846 | BOLING, Ted |
| B-19655 | CORWIN, Bruce |
| B-56290 | BEASLEY, Raymond |

/s/ T. M. McDonald
T. M. McDonald
Correctional Counselor III

TMM/ejf

(Letterhead of State of California—
Health and Welfare Agency, Department of
Corrections, California State Prison,
San Quentin, California 94964)

10-9-74

Received this date 10-9-74 the following files and confidential files for review by the Attorney General and Attorney.

Received by: /s/ [Records Officer]
Records Officer
P&CS Region II

10-9-74
Date



| | |
|---|---|
| B-37644 | Santiago |
| B-14449 | Scott |
| B-36149 | William |
| B-50543 | Bowser |
| B-10646 | Daniels |
| B-47649 | Williams |
| B-10752 | Stewart |
| B-7207 | Ross |
| A-54010 | Smoot |
| A-11122 | Taffoya |
| B-49152 | Peck |
| B-19205 | Snow |

CONFIDENTIAL CASE RECORDS

NAME: BOWSER NUMBER: B-50543

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

1—Clinical evaluation—treatment sensitive

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/[CDC Official] | 10-8-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

refused to sign D E Brown 10-15-74

Signature Date



CONFIDENTIAL CASE RECORDS

NAME: SCOTT NUMBER: B-14449

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

Youth Authority Records

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-7-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

refused to sign D E Brown 10-15-74

Signature Date

CONFIDENTIAL CASE RECORDS

NAME: PECK NUMBER: B-49152

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

None

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-7-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ Fay Stender | Oct 15 74 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: Daniels NUMBER: B-10646

Central File Examination Requested by:

☐ Person Named ☒ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

1—2 page document expressing fear.
1—1 page document expressing fear.
1—CII Rap Sheet for another person.
1—letter of fear.
1—letter of fear.
1—1 page form, implied confidential.
1—3 page form, implied confidential.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-07-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ Fay Stender | Oct 15 1974 |
|---|---|
| Signature | Date |

CONFIDENTIAL CASE RECORDS

NAME: TAFFOYA NUMBER: A-11122

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

1 Incident Report by R. S. Miller 2-27-72—Endanger life
Cum Sum of Ortiz a-57080

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/[CDC Official] | 10-8-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ Sidney Wolinsky | Oct. 15 '74 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: SANTIAGO, Jack Benjamin NUMBER: B-37644

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

District Attorney correspondence May 17, 1973
District Attorney correspondence April 11, 1973
CII Report accompanying vistor request dated 1-8-72
CII Report accompanying vistor request dated 2-19-72

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-8-74 | S.Q. |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ S. Wolinsky | Oct. 15 '74 |
|---|---|
| Signature | Date |

CONFIDENTIAL CASE RECORDS

NAME: Stewart NUMBER: B-10752

Central File Examination Requested by:

☐ Person Named ☒ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

C/P Information—Cum. Sum and CII Reports, Board Reports and P.&C.S. Report.
C/P Information—Cum. Sum.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-08-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination. But do not know what C/P refers to

/s/ S. Wolinsky Oct. 15, 1974

Signature Date



CONFIDENTIAL CASE RECORDS

NAME: WILLIAMS, Curtis E. NUMBER: B-47649

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

None

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-7-74 | S.Q. |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowlege receipt of a copy of this listing of material withheld from my examination.

/s/ S. Wolinsky Oct. 15

Signature Date

CONFIDENTIAL CASE RECORDS

NAME: WILLIAMS NUMBER: B-36149

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

Views of Judge and District attorney per 3046 P.C.
Contained in
Proceedings at sentence.
Paragraph in Probation Officer's report deleted in accordance with 3046 P.C.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/[CDC Official] | 10-8-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ S. Wolinsky | Oct. 15 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: SNOW NUMBER: B-19205

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

NONE

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-7-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| refused to sign D E Brown | 10-15-74 |
|---|---|
| Signature | Date |

CONFIDENTIAL CASE RECORDS

NAME: ROSS,
Johnnie Earl NUMBER: B-7207——

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☒ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

District Attorney correspondence 4-18-74
Memorandum to Office of Attorney General 7-5-74
Crime Partner Records

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-7-74 | S.Q. |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

refused to sign D E Brown 10-15-74

Signature Date



CONFIDENTIAL CASE RECORDS

NAME: Smoot NUMBER: A-54010

Central File Examination Requested by:

☐ Person Named ☒ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

None.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10-07-74 | SQ |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

refused to sign D E Brown 10-15-74

Signature Date

CONFIDENTIAL CASE RECORDS

NAME: MARTIN, WILLIAM NUMBER: B-56926

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

No material has been deemed to be confidential. No material has been removed from File.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ B E Bergesen III | 10/11/74 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: SMITH, JAMES NUMBER: B-57431

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

No material in the inmate's File has been deemed to be confidential. No items have been removed from the C-File.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ B E Bergesen III | 10/9/74 |
|---|---|
| Signature | Date |

CONFIDENTIAL CASE RECORDS

NAME: BOLING, TED NUMBER: A-42388

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

(1) Memo of 6/6/72—Identifies name of informant concerning escape attempt. Disclosure would jeopardize safety and welfare of informant.
(2) Cumulative Case Summary of crime partner—Burch, A-78819

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ B E Bergesen III | 10/9/74 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: CHARLES ELLIS NUMBER: B-41113

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

No material in the Central File is deemed to be confidential. No material has been removed.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ B E Bergesen III | 10/9/74 |
|---|---|
| Signature | Date |

CONFIDENTIAL CASE RECORDS

NAME: CORWIN, BRUCE NUMBER: B-19655

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

No material has been found to be confidential. None removed from C-File.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ B. E. Bergesen III | 10/9/74 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: THEUS, JIMMY NUMBER: A-93228

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

(1) Letter of 9/16/73 Submitted RE Views of Parole.
(2) CDC-279 of 9/13/71 in the case of crime partner Sparks, A-91280.
(3) Cum Sum of Sparks, A-91280, crime partner.
(4) Cum Sum of Paxton, A-91939, crime partner.
(5) CDC-279 of 2/13/68 of Paxton, A-91939.
(6) CDC-279 of 2/16/70 of Paxton, A-91939.
(7) Letter of 9/20/73 RE Views concerning release.
(8) Interview report of 1/26/72 RE Views concerning parole.
(9) Letter of 10/12/72 RE Views concerning parole.
(10) Letter of 10/16/72 RE Views concerning parole.
(11) Letter of 10/16/72 RE Views concerning parole.
(12) CDC-279 of 7/17/74 RE Sparks, A-71280.

The above material containing expression of Views concerning parole for a person sentenced to an expressed term of Life are determined to be confidential, Nos (1), (7), (8), (9), (10) and (11).

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ B. E. Bergesen III | 10/11/74 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: POLK, LONNY NUMBER: B-9501

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

No material in the Central File has been found to be confidential. No material has been removed.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ S. Wolinsky | Oct. 15, '74 |
|---|---|
| Signature | Date |

CONFIDENTIAL CASE RECORDS

NAME: DODSON, JOHN NUMBER: B-49942

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

(1) CDC-128-G of 9/4/74—Confidential statement made by another inmate concerning Dodson's aggressive sexual behavior toward him.
(2) Medical report from Brookside Hospital—Had been placed in C-File in error—should be in medical file.
(3) Cumulative Case Summary of crime partner—Spruell, B-50201-A

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ S. Wolinsky | Oct. 15 |
|---|---|
| Signature | Date |



CONFIDENTIAL CASE RECORDS

NAME: BEASLEY, RAYMOND NUMBER: B-56290

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

No material has been deemed to be confidential. No material has been removed from the Central File.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| /s/ B. E. Bergesen III | 10/9/74 |
|---|---|
| Signature | Date |

CONFIDENTIAL CASE RECORDS

NAME: BURNS, MONROE NUMBER: B-33714

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

(1) CDC-279 of 1/8/74 in the case of E. Guillory, B-4431, crime partner.
(2) Cumulative Case Summary of crime partner E. Guillory.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| /s/ [CDC Official] | 10/2/74 | CMF |
|---|---|---|
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

Refused to sign D. E. Brown

Signature Date



[Appendix B]

October 15, 1974

Mr. Sidney M. Wolinsky
Public Advocates, Inc.
Attorneys at Law
433 Turk Street
San Francisco, California 94102
Dear Mr. Wolinsky

Re VanGeldern vs. Kerr
USDC No. C 72-2088 SAW
Inspection of Inmate Files
Your letter of October 15, 1974

This is in response to your letter of October 15, 1974, a copy of which is attached for your convenient reference:

(1) The court's order of August 12, 1974, makes no provision for copying any part of any file to be examined by counsel pursuant to the order.

(2) Any documents withheld from the file are listed in the file together with why they are withheld. I discussed this with Mr. Bergesen who agreed that none of the material withheld appeared from its description to relate to plaintiff's presentation of their case in this action. I told Mr. Bergesen, and reiterate here, if any item so described is of interest to you, you should tell me and the reasons for withholding the document will be reevaluated in light of your expressions of need for the document in this action. As a general proposition the documents are withheld on

the basis of very strong interests of the Department of Corrections in inmate and prison security, and the documents generally do not relate to bases for granting or denying an inmate parole. In my view the strong interests of the Department of Corrections in preserving the confidentiality of these documents overbalances what on their face would appear to be at most a remote possibility of plaintiffs being interested in examining these documents in conjuction with preparation or presentation of their case in this action. It is on this basis that this preliminary, not irrevocable, step has been taken to preserve the confidentiality of these documents.

(3) The court's order of August 12, 1974, relates only to the examination of files of inmates who (A) have appeared at parole consideration hearings at San Quentin or Vacaville beginning August 5, 1974; and (B) have consented to recordation of their parole consideration hearings; and (C) have consented to such examination by counsel.

(4) The court's order of August 12, 1974, requires recordation only after the inmate has actually consented. We read this to reasonably contemplate that such consent has been communicated to the panel and, incidentally, to the machine operator. We are sure that you, as counsel for the inmates, would respect the inmate's option that his case not be recorded. This option would be abridged were recordation to start before communication of consent or lack of consent. Secondly, your characterization of pre-hearing discussions as "deliberations" is inaccurate. Third, I



have been assured that the panel members have not and will not abuse the spirit of the court's order by using this opportunity, or any of the innumerable other opportunities, to deliberate and decide cases out of the presence of the recording machines. If you have any information upon which to base any reasonable concern that such abuses are occurring it is your duty to communicate these facts to me and to the court.

This will also confirm my understanding that you or Mrs. Stender or Mr. Bergesen have had an opportunity to examine each of the inmate files requested in your list accompanying your letter of September 27, 1974, that each of the files requested, except for the file of Rodolfo Rodriguez, No. A 22690, were actually transmitted to the Ferry Building in San Francisco, that you were furnished a comfortable room within which to examine the files, and that each of the files requested were actually presented to you for examination. This will also confirm that an employee of the Department of Corrections was present with you, Mr. Bergesen, or Mrs. Stender at all times when the files were being examined by you and that the presence of this staff member was for the purpose of maintaining the integrity of the files. This will also confirm that such a staff member will be present at any future examination of the files pursuant to the court's order in this action. Finally, this will confirm my understanding that the staff member who is present during your examination of the files is keeping a record of the staff time involved in furnishing this

service, and of the questions asked by counsel and the answers given by staff members present. It is my understanding that this is done for administrative purposes only and that this procedure does not involve keeping any record of conversations which may occur between counsel who are examining the files, and this procedure is not for the purpose of eavesdropping on such counsel.

In accordance with the last sentence of your letter of October 15, 1974, I expect you will contact me to discuss the above matters and to discuss what you may regard as appropriate actions.

Very truly yours,

Evelle J. Younger
Attorney General

Karl S. Mayer
Deputy Attorney General

KSM:pm
Encl.
cc: Honorable Stanley A. Weigel

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[Appendix C]

[Appendix C, a copy of Plaintiffs' Answer to Defendants Motion For Order Terminating Recordation Of Adult Authority Hearings, Plaintiffs Memorandum Of Points And Authorities And Supporting Affidavits, filed in the district court on August 29, 1974, is omitted in printing this appendix.]



[Appendix D]

[Appendix D, the district court's order of August 12, 1974, is omitted in printing this appendix and appears in the Printed Petition For Writ of Certiorari, Appendix pages xxix-xxxiii.]

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[Appendix E]

[Letterhead of Law Offices of
Public Advocates Inc.
San Francisco, California 94102]

September 27, 1974

***HAND DELIVERED***

Karl S. Mayer
Office of the Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102

Re: *Van Geldern vs. Kerr*
*Inspection of Central Files*

Dear Mr. Mayer:

Enclosed and attached as Exhibit 'A' is a list of the files of those prisoners which we would like to inspect in accordance with the discovery order in the instant case. For convenience we have, in addition to the name, tried to mark the prisoner number as well as the institution wherever possible. As we discussed yesterday, Mr. Bergesen and myself would like to

look at these files Wednesday morning, October 2nd. If it turns out that the logistics are such that you are unable to have the files available by then, please let us know by Tuesday afternoon. In that event, we would like to inspect the files on Friday morning, October 4th. Thank you for your cooperation in this matter.

Very truly yours,

/s/ SIDNEY M. WOLINSKY
SIDNEY M. WOLINSKY

SMW/mb
Encl.

REQUEST FOR INSPECTION OF CENTRAL FILES

JACK BENJAMIN SANTIAGO B-37644 (S.Q.)
JIMMY EUGENE SMITH A-87845 (SQ)
R. L. SCOTT B-14449 (SQ)
W. B. WILLIAMS B-036149 (SQ)
WARREN D. BOWSER B-50543 (SQ)
DALE L. DANIELS B-10646 (SQ)
CURTIS E. WILLIAMS B-47649 (SQ)
JERRY STEWART B-10752 (SQ)
JOHNNIE E. ROSS B-7207
VICTOR BELLO A-33206
RICHARD SMOOT A-54010
RODOLFO A. RODRIGUEZ A-22690
SELEDON TALFOYA A-11122
JIMMY THENS A-93228 (VACAVILLE)
RAYMOND H. BEASLEY B-56290 (VACAVILLE)
LONNY R. POLK B-9501-A (VACAVILLE)



J. H. FOX A-90847 (SQ)
LEONARD WILLIAM PECK B-49152 (SQ)
CHARLES HARE B-3836
FELICE PAUL FAILLA A-84114
JAMES M. SNOW B-19205 (SQ)
HAMES E. SMITH B-57431 (VACAVILLE)
WILLIAM H. MARTON B-56926 (VACAVILLE)
MONROE BURNS B-33714 (VACAVILLE)
CHARLES ELLIS B-41113-A (VACAVILLE)
JOHN R. DODSON B-49942 (VACAVILLE)
TED BOLING A-78846 (VACAVILLE)
BRUCE CORWIN B-19655 (VACAVILLE)

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[Appendix F]

October 21, 1974

Mr. Sidney M. Wolinsky
Public Advocates, Inc.
Attorneys at Law
433 Turk Street
San Francisco, California 94102

Dear Mr. Wolinsky:

Re: VanGeldern vs. Kerr
USDC No. C-72-2088 SAW
Recordings of Adult Authority Parole Consideration Hearings

Please promptly furnish me the following information in writing with respect to each parole consideration hearing you, or your designee, have recorded

pursuant to the district court's order dated August 12, 1974:

(1) the name and prison number of each inmate whose hearing has been recorded;

(2) the name of the institution at which the recording was made;

(3) the date on which the recording was made;

(4) the names of panel members, the machine operator (name and occupation of machine operator if not a law student), and of any other persons present at the hearing being recorded.

Please also inform me of the location of the recordings, the name of their custodian, the times when the tapes and playback equipment will be available for use by defendants. Finally, please suggest a mutually convenient place where such an examination may occur.

Very truly yours,

EVELLE J. YOUNGER
Attorney General

KARL S. MAYER
Deputy Attorney General

KSM:pm
cc: Honorable Stanley A. Weigel



[Appendix G]

State of California

HEALTH AND WELFARE AGENCY

MEMORANDUM

Date: October 22, 1974
File No.:
Subject: Male Felons

To: Mr. Karl Mayer
Deputy Attorney General
Office of the Attorney General
Department of Justice
6000 State Building
San Francisco, California 94102

From: Department of Corrections, Sacramento 95814
Marie Vida Ryan, Senior Statistician
Administrative Information & Statistics Section

Regarding our conversation this morning, the attached Chart 1 may give the numbers desired.

Using the total number of male felons who appeared before the Adult Authority with the possibility of term set as a base, we computed the percentage of male felons who were granted release dates each month.

The percentage values of those granted dates in 1974 are:

| | |
|---|---|
| January | 18.8 |
| February | 20.4 |
| March | 19.1 |

| | |
|---|---|
| April | 21.0 |
| May | 25.6 |
| June | 24.4 |
| July | 28.3 |
| August | 28.9 |
| September | 30.7 |

/s/ Marie Vida Ryan
Marie Vida Ryan
Senior Statistician

MVR:kk
Attachment
cc: Joseph Spangler

---

[Appendix H]

[Letterhead of Law Offices of
Public Advocates, Inc.
San Francisco, California 94102]

June 17, 1974

The Honorable
Stanley Weigel
United States District
Court
450 Golden Gate
San Francisco, CA 94102

Re: Gonzalo vs. Procunier
Civil No. C-73-1422 SAW
Findings and Recommendations of United States Magistrate Urdan dated and filed June 11, 1974

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Dear Judge Weigel:

With respect to the above-referenced findings and recommendations, plaintiffs disagree with certain of the findings and recommendations; however, in order not to delay the proceedings any further and to expedite the case, plaintiffs will not at this time file objections to the Magistrate's findings. In other words, in the interest of expediting the case, we will abide by the Magistrate's decision.

However, in the event that the defendants should choose to file any objections whatsoever to the Magistrate's findings or recommendations, plaintiffs will also seek review of those parts of the Magistrate's decision which are objectionable to us including, without limitation, the denial of our motion to have Adult Authority proceedings tape recorded, the restriction on the right to inspect certain central files, and the denial of attorneys fees.

We request, therefore, that this letter be simply filed and made a part of the record in order to preserve our position in the event that the defendants choose to object to any part of Magistrate Urdan's decisions.

Sincerely,
/s/ Sidney M. Wolinsky
Sidney M. Wolinsky

SMW/mb
cc: All counsel

[Appendix I]

CERTIFICATE OF COUNSEL

KARL S. MAYER, hereby certifies as follows:

1. I am a Deputy Attorney General of the State of California, duly licensed to practice before this Court, and have been assigned by my superiors to represent the defendants in *Van Geldern, et al v. Kerr, et al,* No. C-72-2088 SAW, United States District Court for the Northern District of California.

2. On October 18, 1974, Mr. Sidney Wolinsky, attorney for plaintiffs in the above action, telephoned me and stated he was filing a motion respecting defendants' compliance with the court's order of August 12, 1974, that the moving papers would be hand-delivered that afternoon, and that he wanted to shorten the time for the motion so it could be heard on Thursday, October 24, 1974. On Mr. Wolinsky's representation that the moving papers would be hand-delivered that day, and with the expressed understanding that I would have until Thursday, October 24, 1974, to file and serve responding papers, I agreed to the order shortening time.

3. The afternoon of October 18, 1974, I stayed at my office until 6:00 p.m. Mr. Wolinsky's moving papers were not delivered by hand or otherwise on that date.

4. On the afternoon of Monday, October 21, 1974, I received Mr. Wolinsky's moving papers. They had been mailed Friday, October 18, 1974, received at our mail room at 9:30 a.m., on Monday, October 21, 1974,



and after going through our mail room and docket room, reached my desk the afternoon of October 21, 1974.

5. The moving papers are dated October 18, 1974, as is the court's order shortening time, indicating the papers were complete by 4:30 p.m. on that date. My office is just across the street from the court, and within one and one-half blocks of Mr. Wolinsky's office.

6. The procedure for service used by Mr. Wolinsky, despite his representation for hand delivery and despite the close proximity of our offices, consumed two and one-half days of the very brief six-day period from the date of plaintiffs' moving papers to the date of hearing on plaintiffs' motion.

7. Mr. Jerry Simms, an employee of the Department of Corrections at the Ferry Building, informed me that:

a. He and Mr. D. E. Brown, associate parole revocation coordinator, serviced the inspection by plaintiffs' counsel of the files of inmates requested by counsel, and that such inspection took place on October 9, 11 and 15, 1974.

b. That the necessary servicing and monitoring of this inspection expended fourteen man-hours of staff time (this does not include the time of prison staff expended in obtaining, inspecting and transmitting the files).

c. That Mr. Bergesen placed paper clips on the documents that he wished photocopied from the files, and that Mr. Simms' best estimate is

Mr. Bergesen clipped between fifteen and thirty documents per file.

d. That Mr. Simms' best estimate is that it would take one-half hour to disassemble a file, remove the documents to be copied, photocopy them, and reassemble the file.

e. That the purpose of monitoring counsel's inspection of inmate files is to assure the integrity of the files; that the monitoring is not done for any purpose of eavesdropping on any conversations between the persons inspecting the files; that such conversations are in fact not recorded or noted except for questions asked by counsel of the staff monitor and of answers given by the monitor; and that these notes are made only for administrative and training purposes.

8. Mr. Tom McDonald, parole representative at Vacaville, informed me that on Thursday, October 17, 1974, no plaintiffs' monitor arrived at the facility to record the fifteen parole consideration hearings conducted that day.

9. Mr. William Drummond, parole representative at San Quentin, informed me that on each of the following dates no plaintiffs' monitor showed up to record the indicated number of parole consideration hearings: 25 hearings on September 4, 1974; 11 hearings on October 21, 1974; 17 hearings on October 23, 1974.

10. On Wednesday, October 23, 1974, Mr. Drummond informed me that at San Quentin seventy-six parole consideration hearings were conducted Monday and Tuesday, October 21-22, 1974; and that about



sixty such hearings were scheduled for Wednesday, October 23, 1974, and sixty for Thursday, October 24, 1974.

11. On October 18, 1974, I informed Mr. Joseph Spangler, administrative officer of the Adult Authority, of this Court's ruling, the late afternoon of October 17, 1974, that conversations between panel members before an inmate's entry into the room must be recorded unless the panel then knows the inmate has refused consent to record his hearing. Mr. Spangler stated he would advise all Adult Authority members and hearing representatives. On October 23, 1974, I received a copy of a memorandum from Mr. Spangler to all Adult Authority members and hearing representatives, dated October 18, 1974, informing them of this requirement.

12. On October 9, 1974, I had telephone conversations with Mr. Bergesen, counsel for plaintiffs in the above action, wherein Mr. Bergesen complained that documents had been improperly withheld from inmate files furnished for inspection pursuant to the court order, and that he was improperly being denied the right to photocopy documents from the files furnished for inspection. I told Mr. Bergesen that each of the documents withheld from the files were identified in the files as was the reason for each of them being withheld. Mr. Bergesen acknowledged that this was true. I then informed Mr. Bergesen that the stated reasons the documents were withheld were that they were confidential, and it was my understanding that for the most part the documents were of no impor-

tance to plaintiffs' case. Mr. Bergesen agreed with both propositions. I informed Mr. Bergesen that if particular withheld documents appeared to be of interest to plaintiffs' in this action they should so inform me whereupon I would request the Department of Corrections to reevaluate their withholding the confidential documents in light of counsel's expressed need. Neither Mr. Bergesen nor any of plaintiffs' counsel, have made any attempt to do this.

13. Also during my conversations with Mr. Bergesen on October 9, 1974, we discussed the topic of his interest in photocopying documents from the files furnished for inspection. Mr. Bergesen insisted that he was entitled under the provisions of the court's order to photocopy documents. I explained to Mr. Bergesen that no such provision appears in the court's order and that to photocopy the documents would undermine the restrictions in the court's order that examination of the files is limited to counsel for plaintiffs.

14. Mr. Bergesen's inspection of the files on October 9, 1974, was the first such inspection pursuant to the court's order. Regretably, some unforeseen difficulties arose with respect to transmittal of documents from Vacaville to the Ferry Building for counsel's inspection. The documents had left Vacaville via United Parcel Service on Friday, October 4, 1974, or Monday, October 7, 1974. When the documents had not arrived at the Ferry Building by Tuesday, October 8, 1974, extensive efforts were made myself, by Mr. Simms, and by staff at Vacaville to trace the files.



These efforts continued until the morning of October 9, 1974, and culminated in Mr. Simms' chasing down the United Parcel truck on the streets of San Francisco to obtain the files from the truck to bring them to the Ferry Building for Mr. Bergesen's examination that afternoon. Every possible effort was thus expended to accommodate the convenience of Mr. Bergesen. It is expected that these experiences will enable staff to take better measures for transmittal of files to be inspected in the future pursuant to the court's order so that counsel will not be unnecessarily inconvenienced. It is understandable, in my view, that upon this first transport of inmate files some minor disruptions occurred. Clearly these did not occur for the purpose of inconveniencing or harassing counsel in any way.

15. During the week preceding August 5, 1974, I had telephone conversations with Mr. Sidney Wolinsky respecting the recording devices obtained by him to record parole consideration hearings. Mr. Wolinsky personally assured me that he and his staff had tested the machines to be used by placing them on a table and speaking at various volumes and at various distances from the recording device. Mr. Wolinsky personally assured me that the machines were able to "pick up a whisper from across the room."

Dated: October 24, 1974

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General

[Statement of Service Omitted in Printing]

In the United States District Court
for the Northern District of California

[Filed October 29, 1974]

[Caption Omitted in Printing]

PLAINTIFFS' RESPONSE TO DEFENDENTS' OPPOSITION TO PLAINTIFFS' MOTION FOR ENFORCEMENT, CLARIFICATION, AND SANCTIONS

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PRELIMINARY STATEMENT

Defendants contend: (1) that the order shortening time in which to hear plaintiffs' Motion for Enforcement, Clarification and Sanctions was obtained on the basis of misinformation furnished by plaintiffs; (2) that plaintiffs' motion is made in bad faith and for the purpose of unduly consuming the time of this Court and of defense counsel, and of harrassing defendants; (3) that plaintiffs' motion is riddled with distortions of facts and half-truths; (4) that plaintiffs' motion is an attempt to order new discovery, contrary to this Court's Order that discovery be completed by August 15, 1974; (5) that this Court's Order limited plaintiffs' inspection of inmate files to only inmates whose hearings have been recorded; (6) this Court's Order does not specify the photocopying of documents inside the files to be inspected; (7) under the auspices of counsel for plaintiff serious violations have been made of this Court's August 12, 1974, Order; (8) the Court should reevaluate the capacity of counsel of plaintiffs to represent the class of plaintiffs; and (9) the Court's Order for recordation is based on misinformation and thus should be terminated.



Such contentions on the part of the defendants are not only irrelevant to most of the issues here but are simply incorrect. Plaintiffs have great respect for defendants' counsel and find it unfortunate that the intransigence and paranoia of prison officials have somehow led defendants' counsel to file a document of which the principal purpose appears to be to personally attack plaintiffs' counsel.

In fact: (1) plaintiffs did not obtain the Order for Shortening Time on misinformation but plaintiffs did in fact hand deliver, within 10 minutes of filing with the Court, a copy of the Motion of Enforcement, Clarification and Sanctions;

(2) in the process of effecting such hand deliver, at no time were any such documents placed in the custody of either the United States Postal Service or a commercial private delivery service, but were in fact hand delivered by the law clerk of counsel for plaintiff (See Exhibit A, Affidavit of Kenneth Halperin);

(3) all statements made by counsel for plaintiffs to counsel for defendants or to this Court, in the Certificate of Counsel which accompanied plaintiffs' Motion for Enforcement, Clarification and Sanctions, in fact are truthful;

(4) that at no time has counsel for plaintiffs, made any misrepresentations to counsel for defendants, and, further, that at no time has counsel for plaintiffs misinformed this Court;

(5) this Court's Order was made pursuant to Rule 34 of the Federal Rules which provides for "inspection and copying";

(6) counsel for plaintiffs have in no way directed any efforts whatsoever to violate this Court's Order of August 12, 1974, and would never do so;

(7) counsel for plaintiffs have provided, to the best of their ability, professionally responsible representation for the class of plaintiffs represented; and

(8) defendants have used their opposition papers to raise matters only properly raised by an affirmative motion such as their motion to terminate recordation.

Defendants substantive allegations are here dealt with in the order of their first appearance rather than according to the numbered arguments as set forth in the Topical Index in Defendants' Opposition to Plaintiffs' Motion for Enforcement, Clarification and Sanctions; and Defendants' Cross Motion for Sanctions and for Termination of Compelled Recordation of Parole Consideration Hearings (p. i, hereinafter referred to as Defendants Opposition).

## I. Delivery of Documents Were Made In Timely Fashion As Agreed Upon By The Parties Hereto

Defendants contend that the documents related to the Order Shortening Time were agreed upon by the parties hereto to be hand-delivered during the afternoon of October 18, 1974, at Defendants' offices, and that such documents were not so delivered.

Hand-delivery of the moving documents was agreed upon by the Counsel for Plaintiffs and defendants to take place on the afternoon of October 18, 1974.

In fact, at or about 5:00 p.m., on the afternoon of Friday, October 18, 1974, plaintiffs did effect actual



delivery (by hand) of such documents. Further, at no time were such documents ever placed in the mail. (See Exhibit A, Affidavit of Kenneth Halperin.)

Because defendants' staff negligently or accidently failed to convey these documents to him (after the staff assured plaintiffs' messenger that they would do so) defendants' counsel immediately assumed bad faith.

Defendants then leaped to the assertion (1) that counsel for defendants was misled, and (2) that the Court was misinformed with regard to such delivery. Both are unfounded and untrue.

## II. Removal of Documents, Whether Preliminary or Not From Inmate Central Files Is, In Fact, A Knowing Violation of This Courts August 12, 1974, Order

Defendants do not even claim that those documents removed from inmate central files prior to plaintiffs' inspection were removed pursuant to the Order of this Court. Plaintiffs were first advised that documents had been removed from the central files when one of plaintiffs' counsel actually appeared (after arrangements had been made) to inspect files. Timely objection was then made to Karl Mayer, counsel for defendants, by counsel for plaintiffs, B. E. Bergesen, III (see Plaintiffs' Notice of Motion and Motion for Enforcement, Clarification and Sanctions, Exhibit D, Affidavit of B. E. Bergesen, III).

At the time of plaintiffs' first inspection of inmate central files, and at each subsequent time thereafter, plaintiffs were presented with a form entitled "Con-

fidential Case Records." Plaintiffs have viewed 22 inmate central files and have received 22 "Confidential Record Forms." Although defendants state in their opposition at page 6 that "the number of documents is very few and documents have been withheld from only some of the files furnished", 49 such documents of unknown number of pages have been removed from 10 (almost one-half of the total number inspected) inmate central files.

Defendants determination to remove the documents as well as the completion of the Confidential Case Records form is effected by various prison employees who are: (1) self-interested and (2) lacking in competence or expertise to make such legal or other determinations as exemplified by the abstract descriptions of the documents ("letter of fear") and the inconclusive reasons for the deletion which are given ("implied confidential").

Space is provided on said forms upon which to indicate who is requesting the inspections of the central file, with three possible boxes to check. In some of the forms, "Attorney of Record" or "Court" is checked, yet in others none of the boxes are checked.

The language which is used in the forms describing the documents indicate that many of the deleted papers are directly related to the determination made at parole hearings. Some documents are described as "cum sum." In several of the depositions taken in this case of Hearing Representatives, the Hearing Representatives specifically state that they rely upon these "cum sums" for their determinations at the parole hearings.



Defendants in their oppositions state that:

> The documents relate most frequently to information respecting the crime partner of the inmate whose file is to be examined and would have no bearing upon parole consideration of the inmate. (Defendants' Opposition page 6, lines 28-30).

But even such crime partner records are relevant, as defendants well know. Attached hereto as Exhibit B is a transcript of a hearing at which the topic of the inmate's crime partner is discussed.

In addition, the August 12, 1974, Order of this Court did not provide for inspection of only those documents which have a "bearing upon parole consideration" in the opinion of defendants, but all documents available to or which are used by Adult Authority members or Hearing Representatives.

Based on these abstract descriptions and vague reasons for deletions, defendants ask plaintiffs to object to the deletions at which time defendants will reevaluate the decision made by a minor employee. Given the scintilla of information with which plaintiffs are presented, it would be impossible to adequately request such a reevaluation, even if such a procedure had been warranted.

Defendants claim that these documents "are of no importance to plaintiffs' presentation of their claim that certain process is due at state parole consideration hearings." (Exhibit A, Defendants Opposition, page 7, lines 13-15). How do we know that these documents are of no importance to plaintiffs' claims? Because defendants say so?

In short, in opposition to this Court's express order, defendant prison officials have simply invented their own procedure, insist that plaintiffs follow it, and now ignore the lawful decree of this Court.

### III. Plaintiffs In No Way "Flaunt" The Language of the August 12, 1974, Order of This Court

Defendants claim that plaintiffs "flaunt" the "clear language" of this Court's August 12, 1974, Order by asking for clarification and enforcement of this order in regard to (1) photocopying of contents of central files; (2) which files plaintiffs have access to and (3) by failing to record every hearing held since August 12.

Plaintiffs freely admit that due to factors beyond their control not "all" hearings and/or proceedings were recorded. Such factors include short notice of the schedule of hearings, transportation difficulties, and constant motions by defendants to terminate recordation. (See Exhibit C, Affidavit of Ruth Kornhauser.) However, not only have plaintiffs endeavored to the maximum extent possible to comply with this Court's Order and to effect such recording whenever and wherever possible, but the overwhelming majority of recordings have taken place.

Plaintiffs' inability to record each and every hearing and proceeding however provides no reason for defendants to physically prevent such recording (when and where plaintiffs did in fact endeavor to make such recordings).



Furthermore, the recordation which plaintiffs asked this Court for has been carried out in a commendable way. In spite of a constant series of Motions to Terminate the recordings defendants have yet to allege any conduct on the part of plaintiffs which in any way is less than honorable. Any requests made by defendants regarding the recordings have been promptly followed. Even the request not to record the deliberations of hearing representatives previous to the inmate entering the hearing room (which was prima facie contra to this Court's Order) was complied with until clarified by this Court.

At no time have defendants complained about any of the individuals who run the tape recorders at the hearings.

This Court should note that plaintiffs have no control over the rooms in which the hearings take place, nor over the volume of the conversations. Each set of hearings is different. Thus, the basis of defendants' complaint that some of the recording which have been made are faulty and inaudible in places lies not with plaintiffs, but instead with factors such as the tapes, as well as the decibel level of the hearing officers and the inmates' conversation. One might take notice that the inmate at the parole consideration hearing, always tense and anxious, frequently also speaks in a very low tone of voice.

## IV. Counsel for Plaintiffs Have Continually Acted in a Professionally Responsible Way in Representing the Claims of the Class They Represent

Defendants suggest that this Court should reevaluate the ability of plaintiffs' counsel to adequately represent the class of plaintiffs because of such allegations as: (1) "counsel for plaintiffs have not taken these responsibilities seriously or is unable to execute them"; (2) "plaintiffs' counsel failed to record numerous hearings"; (3) counsel for plaintiffs recently asked for inspection of only 22 central files; and (4) a supposed "shotgun approach to discovery".

Such attacks on counsel reflect the abhorrence which prison officials seem to feel toward lawful processes and officers of the court, but are not even helpful as an accurate description of events.

Defendants' attack on counsel for not inspecting more files sooner is typical. Thus, the Order of this Court restricts plaintiffs' viewing of inmate central files to 200. Because of this limitation some method must be used to decide which 200 files will be inspected. A logical method is by reviewing those hearings which have been recorded and assigning them a priority number or, in the alternative, viewing individual cases which have been brought to plaintiffs' attention other than by recording. Thus, any decision made prior to a substantial number of hearings being recorded, transcribed and evaluated would be arbitrary. Indeed, this is a tedious task but any other method would be irresponsible.



Moreover, when viewed with the limitations defendants placed upon plaintiffs in viewing the files it becomes obvious that: (1) to view files before this Court has clarified the August 12, 1974, Order regarding censorship and photocopying of the contents of the central files; and (2) until the materials gather during the recording of hearings are evaluated, it would be to the disadvantage of the plaintiffs to use any portion of this important discovery procedure.

## V. Any and All Requests for Information Made by Defendants Has Been Promptly Replied to, Including the Letter Dated October 21, 1974

The day before defendants' Opposition was filed, plaintiffs received a request for information from defendants. Such request was promptly, courteously, and affirmatively dictated the following day and sent out the day thereafter. A copy of plaintiffs' letter of response is attached hereto as Exhibit D.

Defendants in their letter of October 21, 1974, request plaintiffs to furnish:

(1) the name and prison number of each inmate whose hearing has been recorded;

(2) the name and the institution at which the hearing was made;

(3) the date on which the recording was made;

(4) the names of the panel members, the machine operators (including the name and occupation of the machine operator if not a law student) and of any other persons present at the hearing being recorded.

In fact, defendants have the vast majority of the information requested already in their possession. Under the procedures which defendants set up, plaintiffs must furnish the names of the recording persons prior to their entering the prisons for security purposes. Thus defendants have the names of the recording persons. Plaintiffs have no control over which inmates will have parole consideration hearings or the scheduling of such hearings, thus defendants also have this information.

Regardless of the fact that the information is already known to them, counsel for plaintiffs in a prompt response agreed to furnish at least a substantial part of the information to defendants as soon as possible.

Plaintiffs fail to understand defendants' purpose in emphasizing this matter, because: (1) defendants are already in the possession of most of the requested information and (2) if defendants questioned whether plaintiffs would give defendants the information and did not wish to wait a reasonable time for a response to defendants demand letter of August 21, 1974, defendants could telephone counsel for plaintiffs as had been done on numerous other occasions.

## VI. This Court Should Again Deny Defendants' Improper Request to Terminate Recordation

Defendants' motion to terminate the recordation is but defendants' latest of a series of attempts to suppress the very procedures which are in question in this litigation.



It has become obvious that although defendants' parole consideration hearings remain completely unfettered by the recordation, defendants wish to keep plaintiffs from this information.

Although little has changed since defendants' last motion to terminate less than two weeks ago, defendants now charge that plaintiffs have little regard for the use of the recordings as shown by the failure to record four of 73 panels.

Defendants do not charge any intentional conduct on plaintiffs' part not to record the hearings. More importantly, defendants claim is only that plaintiffs' failure to record is an indication of a belief that the recording is not important. Nothing could be further from the truth. In fact, plaintiffs have in opposition to each motion to terminate by defendants clearly restated that the recordings are providing plaintiffs with the best possible evidence, while never mentioning the burden both in time and money. It should be remembered that little if any energy is required on the part of defendants while plaintiffs must: (1) solicit and coordinate volunteers to operate the tape recorder; (2) provide the tape recorder and tapes; (3) catalogue and secure the tapes and (4) arrange for transportation.

Plaintiffs are puzzled by defendants' inconsistant attitudes of on the one hand chastising the plaintiffs for failing to record four sessions and on the other hand asking the Court to terminate the recordation.

Again, plaintiffs ask this Court to deny defendants' motion to terminate.

## VII. In Light of the Opposition Filed By Defendants to Plaintiffs' Motion, Plaintiffs Ask This Court to Implement Disciplinary Actions

In light of the facts that:

(1) plaintiffs' counsel have been put to extraordinary time and expense, including not only preparation of this motion but such things as inspection of files which must be repeated;

(2) defendants mistakenly claim that there was no delivery of plaintiffs' moving documents when, in fact, there was;

(3) defendants' counsel has accused counsel for plaintiffs of misleading this Court on the basis of the above; and

(4) defendants' counsel has falsely accused plaintiffs counsel of incompetence; substantial sanctions and compensation to plaintiffs' counsel would be in order. We suggest that $2,000 would be an appropriate sum.

In addition, to insure that plaintiffs not be put on unfair disadvantage, plaintiffs reiterate their request made in Plaintiffs' Motion for Enforcement, Clarification and Sanctions:

(1) that certified law students or attorneys under the supervision of counsel for plaintiffs be permitted to inspect and copy the inmate central files in addition to the counsel for plaintiffs; and

(2) that all photocopying of materials within the central files (which is expected to be substantial)



be done immediately after request by plaintiffs and by and at the expense of defendants.

Respectfully submitted,
/s/ Sidney Wolinsky
Sidney M. Wolinsky
Attorney for Plaintiffs

Dated: October 29, 1974

[Certificate of Service Omitted in Printing]

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[Exhibit A]

### Affidavit of Kenneth Halperin

State of California
County of San Francisco—ss.

I, Kenneth Halperin, being duly sworn, depose and say:

1. I am a citizen of the United States and a resident of the State of California.

2. I am a Certified Law Student pursuant to Rules VI and VII of the rules governing the Practical Training of Law Students under the supervision of attorney Sidney M. Wolinsky, a member in good standing of the State Bar of California.

3. Under the supervision of Mr. Wolinsky, I was responsible for the typing, photocopying and service of plaintiffs' Motion For Order Shortening Time and Notice and Motion for Enforcement, Clarification and Sanctions, in the above-captioned action.

4. On Friday, October 18, 1974, at or about 5:00 p.m., I hand-delivered a copy of said motion to the office of counsel for defendants in the above-captioned action. When I arrived at the office of counsel for defendants the reception area was void of persons. I knocked on all doors and found that they were locked. No one answered my knocking. At this time an unidentified man exited the offices. I asked him if Karl Mayer, counsel for defendants, was in his office. He answered that he did not think so. I told this unidentified man that I had a document for Mr. Mayer. He suggested that I place the document on the receptionist's desk. I remained in the reception area for about five minutes more, then reached through the glass enclosure which surrounds the receptionist and placed the documents in a conspicuous position on the receptionist's desk.

5. At no time has any such document been placed in the custody of the United States Postal Service or in the hands of a commercial delivery service for delivery to counsel for defendants, Karl Mayer.

6. The only copy of plaintiffs' Motion for Order Shortening Time and Notice and Motion for Enforcement, Clarification and Sanction which could possibly be in the custody of counsel for defendant, Karl Mayer, is the copy which was left on the receptionist's desk.

/s/ Kenneth Halperin
Kenneth Halperin

[Jurat Omitted in Printing]



[Exhibit B]

NOTICE OF SEALING OF DOCUMENT

By order dated December 3, 1974, the United States District Court, in *Van Geldern v. Kerr,* C-72-2088 SAW, USDC-ND Cal., ordered:

> ". . . those portions of the record in this proceeding which contain transcripts or partial transcripts of inmate hearings in which the identity of the subject inmate or any other inmate or former inmate is revealed shall be immediately sealed and such portions shall be open for inspection only by further order of this court."

Such a transcript would ordinarily be at this location in the record. It is deleted in accordance with the above order.

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General

---

[Exhibit C]

[Caption Omitted in Printing]

AFFIDAVIT OF RUTH KORNHAUSER

State of California
City and County of San Francisco—ss.

I, Ruth Kornhauser, being duly sworn, depose and say:

1. I am the person coordinating the recording of the Adult Authority Hearings as part of the Discovery in the above-entitled case. In this capacity it has been my responsibility to arrange for all hearings

to be recorded by personally contacting each person to record and informing them as to the responsibilities of a recorder.

2. I have been in constant contact with Karl Mayer, Deputy Attorney General and he has at no time complained to me about the behavior or conduct of any of the people selected to record the hearings.

3. I have received information from Karl Mayer as to the number of hearings scheduled and the dates and institutions at which they are scheduled. However, on some occasions I have not been informed of the cancellation or change in hearing schedule until a few hours before the hearing, at which time it has been most difficult to inform the recorders.

4. It has been my function to contact Karl Mayer and inform him as soon as practical as to the names of persons scheduled to record each hearing. This has been done as soon as possible in each and every case.

5. Of 73 panels scheduled, only four were not recorded. On September 4, October 17, October 21 and October 23, 1974 I could not arrange for recorders, since I was not notified until late in the evening before the scheduled hearing that these recorders were not available. On all other occasions, the recordings took place on schedule.

Dated: October 28, 1974

/s/ Ruth Kornhauser
Ruth Kornhauser

[Jurat Omitted in Printing]



## Exhibit D

[Letterhead of Law Offices of
Public Advocates, Inc.

[Caption Omitted in Printing]

October 24, 1974

Karl S. Mayer
Office of the Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102

Re: Van Geldern vs. Kerr Recordings of Adult Authority Parole Consideration Hearings

Dear Mr. Mayer:

This is in response to your letter of October 21, 1974. The recordings (which, as you know, are in the form of cassette tapes) are located in my own office in a locked metal filing cabinet. I suppose I am the "custodian" since I alone have the key to the cabinet. Playback equipment is no problem since the tapes can be played back on any machine that will handle a normal cassette. I would be pleased to make any or all of the tapes available to you during any normal working hours if you will give me enough time to take care of the logistics. Since your office is only a couple of blocks away, I would suggest that the tapes be examined here and I will, of course, make available to you enough space and comfortable surroundings so that you can examine them at your leisure. If for some reason that seems inconvenient or presents any

problem for you just let me know and I am certain we can work something out.

I should also add that I certainly want to accommodate you in any way on this matter and if you find it preferable I would be willing to make arrangements to have the recordings available to you on a weekend, evenings, or any other time, for just as long as you feel it necessary.

Although I do not quite understand the relevance of some of the earlier material requested in your letter (since I assume that you would have that information) I have requested that the appropriate people compile it for me as soon as possible. If you need anything else please let me know.

Sincerely,

/s/ Sidney M. Wolinsky

Sidney M. Wolinsky

SMW/mb



United States District Court
Northern District of California

[Filed October 31, 1974]

[Caption Omitted in Printing]

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR ENFORCEMENT, CLARIFICATION, AND SANCTIONS.

1. *One of the affidavits accompanying plaintiffs' papers on this motion is false.*

"Plaintiffs' response to defendants opposition to plaintiffs motion for enforcement, clarification, and sanctions" includes as Exhibit A an affidavit of Kenneth Halperin which reads in part as follows:

> "5. At no time has any such document [plaintiffs moving papers] been placed in the custody of the United States Postal Service or in the hands of a commercial delivery service for delivery to counsel for defendants, Karl Mayer.
>
> "6. The only copy of plaintiffs' motion for order shortening time and notice and motion for enforcement, clarification and sanction which could possibly be in the custody of counsel for defendant, Karl Mayer, is the copy which was left on the receptionist desk." This affidavit was given by Kenneth Halperin under oath on October 29, 1974.

Attached to plaintiffs moving papers is an affidavit of service executed by Kenneth Halperin on October 18, 1974. This affidavit reads, in relevent part:

> "On October 18, 1974, I served the within MOTION FOR ORDER SHORTENING TIME

WITHIN WHICH TO HEAR MOTION FOR ENFORCEMENT, CLARIFICATION AND SANCTIONS, MOTION FOR ENFORCEMENT, CLARIFICATION AND SANCTIONS ORDER on the opposing counsel in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States Post Office mailbox at San Francisco addressed as follows: Karl Mayer, Esq., Deputy Attorney General, Room 6000—State Building, San Francisco, CA 94102. I, Kenneth Halperin certify under penalty of perjury, that the foregoing is true and correct. Executed on October 18, 1974 at San Francisco, California."

Plaintiffs, and Mr. Halperin, are, of course, aware of the distinction between service by mail and personal service. The certificate of service accompanying "Plaintiffs Response to Defendants Opposition to Plaintiffs Motion for Enforcement, Clarification, and Sanctions," received by the Attorney General's Office shortly after 4 p.m. on October 29, 1974, is accompanied by an attached "Certificate of Personal Service."

If these documents are demonstrative of the low regard for the solemnity of sworn statements which may be expected from plaintiffs certified law students working under the supervision of Mr. Wolinski what, may we ask, is to be expected from other employees, associates, or volunteers working with plaintiffs counsel?

2. *Delivery of plaintiff moving papers was not timely.*

Counsel for plaintiffs, and Mr. Halperin, well knew that the office of the Attorney General closes at 5 p.m.



Mr. Halperin's affidavit, states that when he arrived at the Attorney General Office "at or about 5 p.m." no one was behind the receptionist desk and the doors were all locked. Mr. Halperin's affidavit then states that he reached through the glass enclosure at the reception desk and placed the documents in a conspicuous position on the receptionis desk. Although this may have been conspicuous to the receptionist staff when they returned Monday morning, October 21, 1974, this location would not be be conspicuous to anyone else. Indeed, the receptionist's enclosed cubical is behind a locked door so that even were the documents seen, and even were the addressee and the source of the document discernable from an observer's position outside of the receptionist area, access to it could have been gained only by calling the State Police to use their master key to open the receptionist area.

As is stated in the certificate of counsel of Karl S. Mayer, counsel for defendants, Mr. Mayer was in his office until 6 p.m. on Friday October 18, 1974. There was no phone call to counsel for defendants from counsel for plaintiffs, or from Mr. Halperin to notify defendants' counsel either that Mr. Halperin was on his way at such a late hour with the documents, or to notify such counsel that the documents had been delivered and to notify him of their location.

There was no negligence on the part of the clerical staff of the Attorney General's Office in delivering to defense counsel's desk the early afternoon of Monday October 21, 1974 the documents first noticed by staff that morning. The Attorney General's docket room

in San Francisco serves over 100 attorneys and must keep records on thousands of active cases. Court documents must be duly docketed just as they must by the clerk of this court. Defendant submits that the time within which this was accomplished compares favorably to the time within which docketing and delivery to the court is accomplished by the office of the clerk of this court.

Plaintiffs "delivery" of these documents after closing hours, and with no effort to notify waiting counsel by phone, is no more personal delivery than would be the sliding such documents under the door of the office of the clerk of this court after 4:30 p.m. Defendants note in passing that plaintiffs moving papers were not filed by the clerk of this court until Monday October 21, 1974. Whatever was the truthful manner of service of these documents, and this cannot be discerned from the affidavits of Mr. Halperin, the manner of the alleged personal service in fact used was indistinguishable from service by mail and in fact resulted in the same unwarranted delay.

3. *Plaintiffs response does not discuss plaintiff's asserted right to examine files of unrecorded inmates, or to make photocopies of the contents of inmate files.*

Defendants opposition to the plaintiffs motion points out that plaintiffs mislead the court by asserting defendants had violated the court's order by not permitting plaintiffs to photocopy the contents of the inmate files examined pursuant to the court's order, and that defendants also violated the court's order



by not permitting plaintiffs to examine the files of inmates whose parole consideration hearings were not recorded pursuant to the order. Plaintiffs response to defendants opposition does not discuss these two points other than to say in a sweeping conclusory fashion that "this court's order was made pursuant to Rule 34 of the Federal Rules which provide for 'inspection and copying.'" (Plaintiff response, pg. 2 lines 13-14).

4. *Defendants good faith preliminary efforts to preserve the confidentiality of certain documents is not a knowing violation of the court's order and pales into insignificance when compared with plaintiffs irrevocable failure to record a great number of parole consideration hearings in direct violation of the court's order.*

The few confidential documents withheld from plaintiffs inspection of the contents of inmate files were withheld as a *preliminary* matter and exist and are subject to examination by counsel under proper circumstances. These documents were not destroyed and, indeed, have each been identified as has been the reason for their being withheld.

On the other hand, however, plaintiffs failure to record at all 68 entire parole consideration hearings, and their failure to reliable record numerous other hearings, is *irrevocable.* There is no way that these recordings can be reconstructed and this evidence is forever lost and can never be used to truthfully inform the court. This has occurred despite the court's

order that "plaintiffs shall be responsible for operating said tape recorder and shall see to it that all aspects of hearings are recorded . . ."

Although plaintiffs proudly inform the court of their failure to have made reliable recordings of numerous hearings conducted in August 1974, plaintiffs never informed the court of their *complete failure* to record numerous other hearings. This came to light only when defendants notified the court of plaintiffs failure to comply with the clear affirmative language of the court's order.

5. *Defendants object to Exhibit B attached to plaintiffs response.*

Plaintiffs attached to their response to defendants opposition a document (Exhibit B) which reports to be a transcript of one of the parole consideration hearings recorded by plaintiffs. (Plaintiffs response, pg. 5 line 6-9). Defendants object to this transcript upon the following grounds: (a) Neither the inmate nor any of the panel members are identified; (b) The transcriber of the document is not identified; (c) The transcript itself is not verified by whoever it was who transcribed it; (d) The transcript is itself not the best evidence of what occurred at that particular parole consideration hearing; (f) Nothing reportedly discussed in that transcript with respect to the inmate's crime partner's records would clarify plaintiffs case, or even the discussion itself insofar as it may relay to plaintiffs case and to their claims that certain process is due at parole consideration hearings.



Defendants also note that by deleting the name of the inmate reported, and by deleting the name of the inmate's crime partner in this transcript, plaintiffs acknowledge the confidentiality of the crime partner's records.

6. *Plaintiffs method for selecting inmates files to be examined is unsatisfactory and is contrary to the expectations of the court and to the earlier position assumed by plaintiffs.*

Defendants expressed method for selecting inmate files to be examined pursuant to the court's order is to first listen to the tapes of parole consideration hearings, and then to select particular files for examination. Plaintiffs initial demands for a right to inspect inmate files was premised on an expressed need for random sampling of the contents of the files as has been the court's continuing permission for plaintiffs to record and inspect. Plaintiffs selection process is the very antithesis of random sampling. Plaintiffs tactics are designed only to discover some allegedly unsatisfactory file or some allegedly unsatisfactory parole consideration proceeding and then to inform the court only of that type of circumstance. The excessive amount of time being consumed by plaintiffs counsel to accomplish this result is unjustified.

7. *The information which defendants request plaintiffs be ordered to furnish respecting recordings already made is possessed only by plaintiffs.*

Although defendants know what inmates were scheduled for parole consideration hearings and know

what machine operators appeared at particular institutions on particular dates, only plaintiffs know what machine operators recorded particular inmates, the occupations of the machine operators, and what recordings were successfully and reliably made.

In view of the serious affirmative obligation cased on plaintiffs by the clear language of the court's order of August 12, 1974, and in view of plaintiffs confessed failure to record at all numerous hearings, and their failure to record reliably numerous other hearings, defendants feel the information requested is of critical importance. Defendants have no way of knowing how much of this evidence, alleged as crucial to this litigation, has been lost forever by plaintiffs conduct.

Dated: October 30, 1974

Evelle J. Younger, Attorney General

Jack R. Winkler, Chief Assistant
Attorney General—Criminal Division

Edward P. O'Brien
Assistant Attorney General

John T. Murphy
Deputy Attorney General

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General

KSM:jl

[Declaration of Service Omitted in Printing.]



In the United States District Court
for the Northern District of
California

[Filed November 11, 1974]

[Caption Omitted in Printing]

NOTICE OF MOTION AND MOTION FOR MODIFICATION OF AUGUST 12, 1974, ORDER

Plaintiffs hereby request, pursuant to Rule 34 of the Federal Rules of Civil Procedure, that plaintiffs be permitted to photocopy such documents as will be designated by plaintiffs' counsel and contained in the inmate central files which plaintiffs may inspect pursuant to the August 12, 1974, Order of this Court.

Each inmate central file contains evidence relevant and material to the matters involved in this action, as well as material calculated to lead to admissible evidence as is more fully shown in the Affidavit of Sidney M. Wolinsky, (Exhibit A). Photocopying of this evidence will be done only when counsel for plaintiffs deem such documents to be genuinely of assistance for proper presentation of plaintiff's action.

Any and all such photocopying will be made only after counsel for plaintiffs have received informed written consent of the inmate involved. Accompanying the consent form will be a letter which fully explains counsel for plaintiffs' purpose and use of such information. Attached hereto as Exhibit B is a copy of the proposed consent form and accompanying letter.

Plaintiffs had previously on October 9, 1974, made a request for photocopying of such documents upon defendant. (Exhibit C). Defendant responded negatively to such request. Counsel for plaintiffs did serve a written request for photocopying upon counsel for defendant, Karl Mayer, on October 15, 1974 (Exhibit D). On October 15, 1974, defendants refused plaintiffs' written request for photocopying of documents contained in inmate central files (Exhibit E). Because of defendants' failure to cooperate by refusing each and every request for photocopying, plaintiffs now seek this order.

Defendants are in possession or control of each such inmate central file which can be requested by plaintiff according to the August 12, 1974, Order of this Court. Plaintiffs request that the photocopying of such documents as are requested by plaintiffs be done immediately by defendant after plaintiffs' request. In addition, plaintiffs ask this Court to Order that the parties share the costs of such photocopying.

Although the requests that defendant execute the photocopying and absorb the costs will impose a burden upon defendants, such is warranted by previous actions of defendants by defying this Court's Order of August 12, 1974, and inhibiting discovery by plaintiffs. Such actions by defendant have resulted in untold hours spent by counsel for plaintiffs to insure that the August 12, 1974, Order of this Court is adhered to and in delay caused plaintiffs in preparation for trial.



In addition, plaintiffs move that for the same reasons of confidentiality that dictate that plaintiffs must first obtain consent regarding the use of documents contained in inmate central files, that defendants also be ordered to obtain consent of the inmate previous to their using or showing to persons other than permanent prison employees documents from these files.

Respectfully submitted,
B. E. Bergesen, III
Fay Stender
Sidney M. Wolinsky
J. Anthony Kline
Paul Halvonik
Attorneys for Plaintiffs
/s/ Sidney M. Wolinsky
Sidney M. Wolinsky

Dated:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR MODIFICATION OF THE AUGUST 12, 1974 ORDER

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I. PHOTOCOPYING OF DOCUMENTS CONTAINED IN INMATE CENTRAL FILES IS AUTHORIZED BY RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Although this is a motion for modification of the August 12, 1974, Order of this Court, Rule 34 of the Federal Rules of Civil Procedure clearly provides authority for this Court to order photocopying of docu-

ments contained in the inmate central files. Rule 34 provides:

> Any party may serve on any other party a request (1) to produce and permit the party making the request or someone acting on his behalf, to inspect and copy, any designated documents.
> . . .

Plaintiffs have repeatedly made request of defendants to photocopy documents contained in inmate central files which plaintiffs may inspect pursuant to the August 12, 1974, Order of this Court. The central files requested come within Rule 34.

Therefore, since: (1) photocopying of documents is statutorily provided for; and (2) the contents of inmate central files are within the type of information contemplated to be covered by Rule 34, this Court is requested to Order that photocopying be allowed.

## II. At All Times Defendants Have Complete Control and Thus Unlimited Access to the Important Evidence Contained in Inmate Central Files

Defendants in this action have total control over all central files which plaintiffs may request pursuant to this Court's August 12, 1974, Order. Therefore, defendants can review, inspect, analyze and *photocopy* any of these files, as many times as defendants want, at defendants' convenience, in defendants' own offices and inspection can be done by whomever defendants wish. On the other hand, plaintiffs have strictly limited access and use of this important evidence.



More importantly, defendants can make use of this unlimited source of evidence to provide information unaccessible to plaintiffs at trial: (1) defendants can take certain documents out of some 20,000 central files (not just 200) and do statistical and comparative sutdies; and (2) defendants can show verbatim copies of reports, such as psychiatric reports to expert witnesses; all of which can be done without any prior consent from the inmate.

If plaintiffs are allowed photocopying of documents contained in the inmate central files, plaintiffs will at the least have a chance to do the same kind of analysis with the 200 files that defendants can do with the 20,000 files.

## III. Photocopying Should Be Allowed to Provide an Effective Use of the Information Since the Importance of the Evidence Contained in the Inmate Central Files Has Been Established

Plaintiffs' access to inmate central files has been greatly limited. This limitation does not stem from a recognition that the evidence contained in the files is unimportant but the contrary. Recognizing that relevant and material evidence exists in the central files, access was granted to plaintiffs in a way which was a compromise between not overburdening defendants yet providing plaintiffs with this essential evidence. In addition, United States Magistrate David R. Urdan stated in the Findings and Recommendations dated June 11, 1974, that the information in the in-

mate files and the hearings are "perhaps, the most relevant matters that might tend to support the plaintiff's claims. . . ." Therefore, since the importance of the evidence contained has been established, plaintiffs should be allowed the effective use of this evidence which would result from permitting photocopying.

Effective use of this evidence requires that plaintiffs obtain expert opinions and do comparative and statistical studies of the contents of the files. Neither expert opinions nor studies can be actually achieved without photocopying of documents in the central files. As an example, the full contents of any psychiatric report would be required for a valid analysis. If plaintiffs were forced to hand copy the typed, single spaced psychiatric reports for an inmate who had been imprisoned for a number of years, and undergone numerous psychiatric examinations, it could easily take one full day or more. Although this Court has granted plaintiffs the right to use two assistants in the viewing of central files, hand copying or just one such inmate's psychiatric reports (not to mention the numerous other kinds of reports contained in the files) is overwhelming, especially when viewed with the ease that photocopying the documents could be done. Moreover, only photocopying will permit an effective examination of the materials in question. As the examination now takes place, an attorney for plaintiffs can look at only one file at a time, all bound, in a room in defendants' offices where he or she is being observed by defendants' employees. This makes



comparisons from one file to another, careful analysis, and discussion of particular points between plaintiffs' counsel, all difficult if not impossible. Preparation of the material for presentation at trial in orderly fashion also becomes a virtual impossibility. For all these reasons, photocopying in the instant case is a logical and reasonable discovery device aimed at assembling relevant facts for presentation to the Court and helpful to the ascertaining of truth at trial.

### IV. No Legitimate Reason for Not Allowing Photocopying of Documents Exists When Inmates Have Given Informed Consent

Since the importance of documents contained in inmate central files has already been established and plaintiffs are already permitted to view the contents of the files and take notes, no legitimate reason for not allowing photocopying exists if the inmate gives an informed consent. Therefore, the only grounds for objecting to this photocopying that defendants could make would be to thwart plaintiffs' collecting of evidence damaging to defendants and to make the collection of such evidence a burden to protect defendants and harass plaintiffs.

Plaintiffs' plan for photocopying includes a procedure by which informed consent would be gotten from each and every inmate prior to photocopying of any documents in the central files. Plaintiffs will explain the process in terms easily understood, and will mail a letter of introduction and a consent form ac-

companied by a pre-addressed and stamped envelope. (Exhibit B).

After consent is received, plaintiffs' counsel will then, and only then, photocopy just those documents which, in their view, are of assistance in responsibly preparing the case.

V. DEFENDANTS SHOULD BE REQUIRED TO OBTAIN THE SAME INFORMED CONSENT AS PLAINTIFFS FOR USE OF CONTENTS OF INMATE CENTRAL FILES IN PREPARATION OF EVIDENCE FOR THIS ACTION

Any reasons leading to the conclusion that plaintiffs' counsel should obtain consent of inmates before photocopying applies with even greater force to defendants, who are representing the prison institution *against* a class of prisoners. Plaintiffs therefore respectfully request that this Court order defendants to attain the same informed consent that plaintiffs must attain previous to using the contents of the central files in preparing for trial of this case. Plaintiffs do not ask that permanent employees of the California Department of Corrections first must get consent from inmates to either go about the normal usage of contents of these files, but where contents of files are taken to sources outside the permanent prison employees or for the purpose of preparing for trial in this action consent should be gotten.

If consent is needed for contents of central files to be shown to experts or to be introduced into evidence by one party to an action because of confidentiality,



then the same reason for confidentiality exists for the other party also.

Respectfully submitted,
B. E. Bergesen, III
Fay Stender
Sidney M. Wolinsky
J. Anthony Kline
Paul Halvonik
/s/ Sidney M. Wolinsky
Sidney M. Wolinsky

Dated: November 8, 1974

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[Exhibit A]

CERTIFICATE OF COUNSEL

SIDNEY M. WOLINSKY, here certifies as follows:

1. I am an attorney at law duly admitted to practice before this Court and am counsel for plaintiffs in an action entitled, *Van Geldern, et al., v. Kerr, et al.,* No. C-72-2088 SAW, in the United States District Court for the Northern District of California. I have today spoken to Karl Mayer, Counsel for defendants who agreed to an Order Shortening Time so that this matter may be heard on the Court's calendar on Thursday, November 21, 1974, at 2:15 p.m., if that is convenient to the Court.

2. This Court on August 12, 1974, ordered defendants to provide plaintiffs with up to 200 inmate cen-

tral files. Pursuant to this order plaintiffs filed a Motion for Enforcement, Clarification and Sanctions which in addition to other points concerned (1) which inmate central files were to be accessible to plaintiffs; (2) whether defendants could remove documents from files prior to plaintiffs' inspection; and (3) whether plaintiffs are permitted to photocopy documents contained in the inmate central files. This Court has ruled that defendants must provide any requested inmate files regardless whether the inmate's parole consideration hearing has been recorded and that no documents could be removed from the file prior to inspection. As to the request for photocopying, it was suggested by this Court that a formal motion for such be made if plaintiffs' counsel required photocopying. It is for this motion that plaintiffs request the Order Shortening Time.

3. The original Order from this Court regarding plaintiffs' inspection of central files is over two months old (August 12, 1974). Because valuable time has already been lost in clarifying the August 12, 1974, Order counsel for plaintiffs' request to have the Motion for Modification heard within a shortened period. Any effect that this loss of time has had on plaintiffs' action could be eliminated if no further time is lost in clarifying the extent of plaintiffs use of the inmate central files.

4. I have personally inspected a number of inmate central files which may be potentially one of the most valuable sources of evidence in plaintiffs' action. These files have been anywhere from two inches to



six inches thick and have contained upwards of a hundred pages.

Because plaintiffs have not been allowed to photocopy any documents contained in the central files, I have been unable to make the most effective use of the materials inside. As an example, some documents which are typed single spaced and several pages long obviously contain relevant and material data to plaintiffs. But, because of, *inter alia:* (1) only being able to take notes; and (2) the numerous references made by abbreviations which may possibly refer to other documents, plaintiffs have been unable to obtain competent expert opinions as to the meaning of many of the notations examined.

/s/ Sidney M. Wolinsky
Sidney M. Wolinsky

[Jurat Omitted in Printing]

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[Exhibit B]

Dear

Under a United States District Court Order parole hearings since August at San Quentin and Vacaville have been recorded and some inmate central files have been inspected by counsel for plaintiffs in the case of *Van Geldern vs. Kerr.* Plaintiffs in this case are all California prisoners in prison and on parole. Defendants are the Director of Corrections and Adult Authority Members.

At plaintiffs' request, the Court has modified the order which allowed recording and inspection of central files to include photocopying of documents contained in these files. After copying, these documents may be shown to experts and persons who plaintiffs' counsel deem to be necessary to help in preparing the lawsuit. Further, it is possible that the photocopies of these documents, along with those from other prisoners, may be introduced into evidence in this case.

The Court has provided that plaintiffs must obtain the consent of inmates before photocopying of documents in the central file. Attached is a consent form; please read it carefully before you sign. In any case, please return the form so that we know that each inmate who could have exercised his right has been given a chance to do so.

Very truly yours,
Counsel for Plaintiffs

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CONSENT FORM

I understand that documents photocopied from my central file may be shown to experts and others who counsel for plaintiffs in *Van Geldern v. Kerr* deem necessary to assist in the preparation of this lawsuit. Further, I understand that if I consent, such photocopied documents, along with those from other inmates, might be introduced into evidence at the later trial of this case.



Please check one:

☐ I *consent* to documents of my central file being copied

☐ I *object* to any documents of my central file being copied

_____
Signature of inmate

_____
Please print name

_____
Date

---

[Exhibit C]

[Caption Omitted in Printing]

AFFIDAVIT OF B. E. BERGESEN, III

State of California
City and County of San Francisco—ss.

I, B. E. Bergesen, III, being duly sworn, depose and say:

1. I am a member of the Bar of this Court and am one of the attorneys for plaintiffs herein.

2. On or about the evening of October 8, 1974, I was informed that the Adult Authority hearing representatives who were holding hearings at the California Medical Facility at Vacaville during the week of October 7 were prohibiting the taperecording of those

portions of the hearings which were held prior to the inmate's entry into the hearing room. Because I believed this practice to be contrary to this Court's order ordering the taping of such hearings, I telephoned Deputy Attorney Karl Mayer on October 9, 1974, to protest this practice. Mr. Mayer acknowledged that he had informed the hearing representatives that they did not have to permit the recording of such portions of those hearings. I informed him that I believed that was a violation of the Court's order, but he did not agree, and indicated that such portions of the hearings would continue to be unrecorded.

3. On October 9, 1974, I went to the Adult Authority offices in San Francisco to inspect the central files of certain Department of Corrections inmates whose hearings had been recorded at Vacaville, pursuant to the order of this Court. As I began to inspect the files, I was informed by parole agent J. Simms that (1) I could not photocopy any of the documents and (2) some of the documents from some of the files had been removed prior to my inspection. I protested to him that this was not in accordance with the Court's order, whereupon he referred me to Karl Mayer, Esq. I telephoned Mr. Mayer to make my protest, but he took the position that we did not have the right to photocopy documents or to see all of the documents therein. I informed him that I was being required to follow the same procedure for inspecting central files as any inmate or other attorney under the Department's so-called *Olson* regulations,



which gives any inmate and his attorney the right to see certain portions of the file pursuant to certain procedures. I told Mr. Mayer that our authority to view these files was not based upon the Department's *Olson* regulations, but rather the order of this Court pursuant to our motion for production of documents made under Rule 34, Federal Rules of Civil Procedure, which requires production for inspection *and* copying; and that the Court's order did not authorize the removal of any documents. However, Mr. Mayer took the position that the procedure the Adult Authority employees were following was proper, and he would not countermand it. Consequently, I was not permitted to photocopy any of the documents in any of the files, although I wished to do so.

4. Due to the files arriving at the Adult Authority offices in the afternoon (rather than 9:00 o'clock in the morning, as scheduled), I was able to examine only 7 of the 10 files sent down. In each case I signed a form stating that I had received a copy of that form, listing the documents which had been removed therefrom; however, due to a reported breakdown of the xerox machine when I went back to finish my inspection on October 11, 1974, I was not given any such copies. Mr. Simms promised to send them to me through the mail during the afternoon of October 11.

Dated: October 11, 1974.

/s/ B. E. Bergesen, III
B. E. Bergesen, III

[Jurat Omitted in Printing]

[Exhibit D]

October 15, 1974
Mr. Karl S. Mayer
Deputy Attorney General
Office of the Attorney General
Department of Justice
State Building
San Francisco, California 94102

Re: Van Geldern v. Kerr
USDC No. C-72-2088 SAW
Inspection of Inmate Files

Dear Mr. Mayer:

This is in response to your letter of October 8, 1974 and deals with several matters in which it seems to us you are clearly violating the Court's discovery orders in the above litigation.

With respect to the inspection of inmates central files, I understand that your position is that 1) we cannot photocopy any documents whatsoever in those central files, 2) that you can withhold documents from our inspection (following procedures which you have decided to initiate in response to the *Olson* decision), and 3) that we cannot see any files except those prisoners who happen to have had tape recordings made in accordance with the Court's discovery order. With respect to the taping of parole hearings, I understand that you have now taken the position that the tape can be turned off and the deliberations of the panel members not recorded if the inmate has not



entered the room even though the deliberations are relevant to a case being decided that day.

If I am mistaken about any of the aforementioned and, in fact, that is not your position, I would appreciate it if you would let us know immediately and instruct the appropriate personnel so that we may get on with discovery. If, on the other hand, each of the above is, in fact, the position which you have assumed, please be so kind as to let us know by what possible authority you take that position so that we may discuss the matter and take appropriate action.

Very truly yours,
/s/ Sidney M. Wolinsky
Sidney M. Wolinsky

SMW:jlc

[Exhibit E]

Office of the Attorney General
Department of Justice
State Building, San Francisco 94102

October 15, 1974

Mr. Sidney M. Wolinsky
Public Advocates, Inc.
Attorneys at Law
433 Turk Street
San Francisco, California 94102

Dear Mr. Wolinsky:

Re: VanGeldern vs. Kerr
USDC No. C-72-2088 SAW
Inspection of Inmate Files
*Your letter of October* 15, 1974

This is in response to your letter of October 15, 1974, a copy of which is attached for your convenient reference:

(1) The court's order of August 12, 1974, makes no provision for copying any part of any file to be examined by counsel pursuant to the order.

(2) Any documents withheld from the file are listed in the file together with why they are withheld. I discussed this with Mr. Bergesen who agreed that none of the material withheld appeared from its description to relate to plaintiff's presentation of their case in this action. I told Mr. Bergesen, and reiterate here, if any item so described is of interest to you, you should tell me and the reasons for withholding the document will be reevaluated in light of your expressions of need for the document in this action. As a general proposition the documents are withheld on the basis of very strong interests of the Department of Corrections in inmate and prison security, and the documents generally do not relate to bases for granting or denying an inmate parole. In my view the strong interests of the Department of Corrections in preserving the confidentiality of these documents over-balances what on their face would appear to be at most a remote possibility of plaintiffs being interested in examining these documents in conjunction with preparation or presentation of their case in this action. It is on this basis that this preliminary, not irrevocable, step has been taken to preserve the confidentiality of these documents.



(3) The court's order of August 12, 1974, relates only to the examination of files of inmates who (A) have appeared at parole consideration hearings at San Quentin or Vacaville beginning August 5, 1974; and (B) have consented to recordation of their parole consideration hearings; and (C) have consented to such examination by counsel.

(4) The court's order of August 12, 1974, requires recordation only after the inmate has actually consented. We read this to reasonably contemplate that such consent has been communicated to the panel and, incidentally, to the machine operator. We are sure that you, as counsel for the inmates, would respect the inmate's option that his case not be recorded. This option would be abridged were recordation to start before communication of consent or lack of consent.

Secondly, your characterization of pre-hearing discussions as "deliberations" is inaccurate. Third, I have been assured that the panel members have not and will not abuse the spirit of the court's order by using this opportunity, or any of the innumerable other opportunities, to deliberate and decide cases out of the presence of the recording machines. If you have any information upon which to base any reasonable concern that such abuses are occurring it is your duty to communicate these facts to me and to the court.

This will also confirm my understanding that you or Mrs. Stender or Mr. Bergesen have had an opportunity to examine each of the inmate files requested in your list accompanying your letter of September 27, 1974, that each of the files requested, except for the file of Rodolfo Rodriguez, No. A-22690, were actually transmitted to the Ferry Building in San Francisco, that you were furnished a comfortable room within which to examine the files, and that each of the files requested were actually presented to you for examination. This will also confirm that an employee of the Department of Corrections was present with you, Mr. Bergesen, or Mrs. Stender at all times when the files were being examined by you and that the presence of this staff member was for the purpose of maintaining the integrity of the files. This will also confirm that such a staff member will be present at any future examination of the files pursuant to the court's order in this action. Finally, this will confirm my understanding that the staff member who is present during your examination of the files is keeping a record of the staff time involved in furnishing this service, and of the questions asked by counsel and the answers given by staff members present. It is my understanding that this is done for administrative purposes only and that this procedure does not involve keeping any record of conversations which may occur between counsel who are examining the files, and this procedure is not for the purpose of eavesdropping on such counsel.



In accordance with the last sentence of your letter of October 15, 1974, I expect you will contact me to discuss the above matters and to discuss what you may regard as appropriate actions.

Very truly yours,
Evelle J. Younger
Attorney General

/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General

KSM:pm
Encl.
cc: Honorable Stanley A. Weigel

[Statement of Service Omitted in Printing]

[Title Page, Topical Index, Caption Omitted in Printing]

United States District Court
Northern District of California

[Filed November 20, 1974]

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DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR MODIFICATION OF AUGUST 12, 1974 ORDER AND DEFENDANTS' CROSS MOTION FOR MODIFICATION OF SAID ORDER, AND FOR TERMINATION OF COMPELLED RECORDATION OF ADULT AUTHORITY HEARINGS

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PRELIMINARY STATEMENT

Defendants hereby oppose plaintiffs' motion to modify the court's discovery order dated August 12, 1974. Defendants oppose plaintiff's demands to copy "any and all contents" of up to 200 inmate files; they oppose plaintiffs' demands that one-half the cost of any such copying be absorbed by defendants; and they oppose plaintiff's demands that defendants must obtain inmates' consent prior to use or inspection of the contents of their files by anyone other than "permanent prison employees."

Defendants also hereby move for modification of the court's order (1) to provide for negotiations between counsel and then for *in camera* inspection and balancing as necessary prior to any compelled disclosure for adversary inspection of documents designated as confidential in inmate files; (2) to permit inspection of the files at the institution where they are located; and (3) for termination of the compelled recordation of adult authority hearings.



I

PLAINTIFFS' REQUEST TO PHOTOCOPY THE CONTENTS OF UP TO 200 INMATE FILES SHOULD BE DENIED AS AN UNTIMELY DEMAND FOR NEW DISCOVERY MADE MONTHS AFTER DISCOVERY HAD BEEN ORDERED COMPLETED.

By order dated August 12, 1974, this court ordered that all discovery shall be completed on or before August 15, 1974. A copy of this order is attached hereto as Exhibit A. Plaintiffs' first demand to make any photocopies of any of the contents of inmate files was made orally on October 9, 1974 (see, affidavit of B. E. Bergesen III, Exhibit C attached to plaintiff's moving papers), and in writing on October 15, 1974 (Exhibit D attached to plaintiff's moving papers). Plaintiffs original request for inspection of the inmate files, made by letter dated November 5, 1973, made no reference whatsoever to any right or interest in photocopying any of the contents of any of the files requested. Similarly, plaintiffs motion to compel disclosure of inmate files for inspection by plaintiffs makes no mention of and no request for a right to photocopy any of the contents of the files demanded. The magistrate's Findings and Recommendations, filed June 11, 1974, while recommending that plaintiffs' be furnished access to the files of up to 200 inmates for inspection, makes no reference to and no provision for photocopying any of the contents of any of the files. Finally, this court's order of August 12, 1974 makes no provision for photocopying and makes no reference to photocopying any of the contents of any

of the files to be furnished plaintiffs for inspection pursuant to that order:

Although plaintiffs' cast their motion in terms of a "motion for modification," plaintiffs' request is nevertheless the initiation of new discovery. While Rule 34, Federal Rules of Civil Procedure, does authorize a party to serve on another party a request to permit the copying as well as the inspection of designated documents, plaintiffs never made such a request prior to October 19, 1974. The discovery initiated by plaintiffs' belated request for photocopying is significant. As plaintiffs may be requesting copies of upwards from 15 documents per file, plaintiffs' request will require thousand of photocopies and probably well over one hundred hours of staff time to make the photocopies. (See paragraph 7c and 7d, Certificate of Counsel of Karl S. Mayer, dated October 24, 1974 and attached as Exhibit I "Defendants Opposition to Plaintiff's Motion for Enforcement", Clarification and Sanctions;, etc.," filed October 24, 1974.

## II

### Plaintiffs' Request for Photocopying of the Contents of Inmate Files Should Be Denied As Unwise and Unreasonable.

Indiscriminate photocopying of the contents of inmate files is not necessary to this action. The questions raised are, for the most part, questions of law the resolution of which does not require such extensive discovery.

On the other hand, the potential for mischief created by such discovery is great. The class of persons



who are plaintiffs in this action includes every adult male felon in prison or on parole in the California prison system. This class of persons includes factions which are literally and violently at war with one another, and individuals with great mental or personal problems. The inmate files subject to inspection by this court's order contain information of the most personal and private nature. It is one thing for counsel to inspect these files, but quite another thing for the copies of the contents of hundred of files to be collected and retained by private counsel, or by any other private person outside the prison system and outside the rigid controls of access to such documents such as are imposed on correctional staff.

What are to become of the copies of these thousands of documents at the end of this litigation? The contents of inmate files are not public documents: What safeguards are there to assure that persons other than counsel who have access to these copies will not themselves make recopies and possibly use them for purposes not related to this litigation? Counsel's motion indicates that the documents will pass through several hands including staff of counsel and various consultants and experts and perhaps their staffs for examination and for statistical studies.[1] None of these persons are identified nor are any assurances proposed to safeguard these documents, or

[1]This is contrary to this Court's order filed June 20, 1974 which restricts to "counsel of record for plaintiffs and no more than a total of two investigators designated by such counsel" access to the contents, any copies thereof, of inmate files of the named plaintiffs. This restriction, it would seem, should apply *a fortiori* to the contents of files of inmates who are not named plaintiffs. A copy of this order is attached as Exhibit C.

additional copies of them, from falling into improper hands through inadvertence or negligence.

The risk of such mischief is especially significant with respect to materials designated as confidential and which are apparently within the purview of the courts order as it now reads.[2] As counsel for the inmates, Mr. Wolinsky may have access for inspection of inmate files and for copying documents there from upon a legitimate expression of need, pursuant to "Uniform Inmate Record Procedures." These procedures are set forth in IR-I-08, a copy of which is attached hereto as Exhibit B. These procedures allow every inmate, as well as an attorney for an inmate with that inmate's consent, to examine the contents of an inmate's central file except for documents withdrawn from examination on the grounds of confidentiality. With respect to documents withdrawn as confidential, there is an established review procedure within the department of corrections to resolve questions respecting access to confidential documents. These procedures also allow for copies of documents to be furnished to the attorney without charge where the attorney has examined the document to be copied and has expressed a reasonable need for a copy of the document. (Exhibit E, paragraph A.6.7). Plaintiffs counsel have expressly refused to invoke this procedures, preferring to present blanket demands in the name of Rule 34. Defendants urge plaintiffs' demands

[2]These responding papers of defendants also ask the court's order of August 12, 1974 be modified to maintain the confidentiality of the documents be designated unless their use is demonstrably necessary to this action.



are unnecessary to advancing plaintiffs' interests in this litigation and are unwise under the circumstances. For the above reasons defendants request that plaintiffs demands for blanket photocopying of the contents of the hundreds of inmate files be denied.

## III.

### The Inmate Consent for Photocopying as Proposed in Plaintiff's Moving Papers Is not Informed Consent.

Plaintiffs argue "no legitimate reason for not allowing photocopying exists if the inmate gives an informed consent." Plaintiffs propose to obtain such informed consent by conveyance to the inmate whose file is to be examined and photocopied the letter and consent form attached as Exhibit B to the plaintiff's moving papers.

The consent which may be obtained through use of these forms is not an informed consent because the papers do not inform the inmate that his consent to photocopying tantamount to consent to all the contents of his central file becoming a permanent public record. Nor do the forms inform the inmate that copies of the contents of his file will pass through several hands including assistants and volunteers of plaintiffs' counsel, law students, other counsel, various consultants and their staff, and various experts and their staff. Nor do the forms inform the inmate of the possibility of additional copies being made of the contents of his file as it passes through any or all of these hands. Finally, the papers do not inform the inmate there is

no assurance that these documents, or additional copies thereof, which may be lying around various offices and desks for years after this litigation is completed, will not fall, inadvertently or otherwise, into the hands of other persons or groups which now or sometime in the future may not have the particular inmate's best interests at heart.

Defendant's request that the inmates be informed of these possibilities before they are required to elect whether to consent to counsel for plaintiffs obtaining photocopies of "any and all contents" of the inmates files.

## IV

### The Cost of Any Photocopying Afforded Plaintiffs' Under Rule 34 Should Be Borne Exclusively By Plaintiffs: There Is No Provision of Either Rule 34 or Rule 37 Which Applies to Plaintiff's Request that Defendants Share the Cost of Photocopying.

Plaintiff's motion requests that the cost of photocopying under Rule 34 be absorbed equally by plaintiffs and defendants. Defendants object to this and request that any such cost be borne exclusively by plaintiffs.

Rule 34 makes no provision for costs. Rule 37 does provide for an award of expenses on a motion to compel where the motion is granted and where opposition to the motion is substantially not justified. For the reasons set forth above, defendants urge that plaintiff's motion for photocopying should not be



granted. Defendants also urge that their opposition to the motion is in fact justified for several reasons: (1) the motion is not timely made; (2) the motion is probably unjustified in view of the availability, with out resort to Rule 34, of needed documents under the "Uniform Inmate Record Procedures," (Exhibit B herein) the use of which has been abandoned by plaintiffs in favor of Rule 34; and (3) because the late request for photocopying is most comprehensive and would involve copying thousands of documents and probably over one-hundred man-hours staff time to service just the photocopying parts of plaintiffs request. Plaintiffs' counsel prefers to be left to his discretion the determination of what documents are reasonably needed for plaintiffs' case. We know from plaintiffs other demands for documents, and from plaintiff's motions to compel, that in plaintiffs' view virtually every piece of paper, private or public, in the custody of the Department of Corrections or of the Adult Authority is needed for plaintiffs action. If the court orders plaintiffs be provided the right to obtain photocopies of any and all documents contained in inmate files, defendants request that plaintiffs absorb the expense of the sweeping demands for copies. See, *Barrows v. Koninklijke Luchtvaart Maatsschappij,* 11 F.R.D. 400, 401 (S.D.N.Y. 1951.)

## V

### Plaintiff's Request that Defendants Obtain Consent of Inmates Prior to Their Use or Disclosure of Documents in Inmate Files Has No Relation to Discovery in This Action, Is Irrelevant to This Action, Is Without Basis in Law or Precedent, and Is Unreasonable on Its Face.

Plaintiffs' moving papers urge that if plaintiffs must obtain an inmate's consent prior to inspection and copying of the contents of inmate files, so also should defendants be required to obtain such consent. Plaintiffs proposed order on this point reads as follows: "It is further ordered, that such requirement for consent is also required of defendants previous to their use or showing of documents contained in inmate's central files to persons other than permanent prison employees."

Persons other than "permanent prison employees" who may have a legitimate interest in such documents include federal judges; state judges; members and hearing representatives of the adult authority; the attorney general; district attorneys; federal and state law enforcement officers; and non-permanent prison employees such has physicians and psychiatrists who work with the prison system on a part-time or contract basis. Plaintiffs' proposed order would make it impossible to respond to inmate petitions for habeas corpus in the state or federal courts, or to prosecute inmates for crimes committed by them in prison. This aspect of plaintiff's order serves no interest whatsoever in discovery.



Furthermore, the inmate's consent with respect to documents designated by defendants as confidential is irrelevant. Such confidentiality is asserted not only on behalf of the inmate, but also on statutory grounds and on grounds of strong public policy.

This unreasonable request of plaintiff's should be rejected.

## VI

### Defendants Hereby Move that the Court's Order Be Modified Insofar as it Would Require Disclosure of Confidential Documents on Demand by Plaintiffs' Counsel.

From respective counsels last appearance this action in this court, it appears that the court's order of August 12, 1974 requires defendants to disclose to plaintiff's counsel or their assistants confidential documents without the necessity of counsel expressing any particularized need for individual confidential documents and without any provision for an *in camera* inspection and balancing by the court to determine whether defendant's assertions of confidentiality are well taken and if so to determine whether the confidentiality outweighs the need of plaintiffs' counsel for the documents in this action.

Defendants respectfully request that the court's order be modified to include such procedure. Defendants suggest that it would be appropriate to include in the court's order provisions that defendants may designate particular documents as confidential and state the reasons for asserting such confidentiality; that documents so designated may be withheld, as a

preliminary matter, from inspection by counsel for Plaintiffs; that if upon reading the designations of confidentiality counsel for plaintiffs still feel they need to inspect these documents, such need be expressed with particularity to defendant's counsel so that the confidentiality may be re-evaluated and negotiated between counsel prior to compelled disclosure; that in the event counsel are unable to resolve the matter with such negotiations, the documents still requested by plaintiffs counsel be presented to the court for *in camera* inspection and balancing to determine (a) whether the assertions of confidentiality are well taken and, if so, (b) to balance such confidentiality against plaintiffs expressed need for the documents in this action; and that the disclosure of such documents be compelled only in the situation where the court determines plaintiffs' need for particular documents outweighs defendants assertions of confidentiality.

It is reasonable to suppose that not every confidential document demanded to be inspected by plaintiffs is needed for this action, and that not every confidential document demanded by counsel is relevant and admissible or likely to lead to relevant and admissible evidence. Defendants request only a reasonable procedure to separate, from the mass of documents demanded for inspection by plaintiffs, documents which are confidential and of little or no use to plaintiffs in this action.



## VII

### Defendants Request that the Court's Order Be Modified to Permit Inspection of Inmate Files at the Institution Where the File Is Kept.

The court's order of August 12, 1974 presently requires that inmate files be furnished for inspection by counsel for plaintiffs at the Ferry Building in San Francisco. To accommodate this it is necessary that files be shipped from the institutions where the inmates are incarcerated. Such shipment entails expense, time, and a risk of loss or destruction of these files or some of their contents.

This provision of the court's order came about as a result of discussions between counsel and the court, in open court, respecting the inconvenience which would be cast upon plaintiff's counsel where inspection of inmate files was restricted to counsel of record, and where counsel would have to travel to the institution. At our last appearance in this action the court indicated it would order that counsel for plaintiffs be permitted two assistants, for purposes of examining inmate files. If the court modifies its order to permit this, then defendants urge that there is no longer any good reason for requiring defendants to transport hundreds of inmate files from San Quentin and Vacaville to San Francisco for inspection by counsel for plaintiffs. With the assistance of two persons, not attorneys, plaintiffs will not be unduly inconvenienced by having to go to the institutions for inspection of the files.

## VIII

### Defendants Request that the Compelled Recordation of Adult Authority Hearings Be Terminated.

During the period of November 18 thru 27, 1974 Adult Authority Parole consideration hearings are calendared to take place at San Quentin. These hearings will be subject to recordation pursuant to the courts' order of August 12, 1974. This will bring to approximately 1200 the number of adult authority parole consideration hearings which have been recorded in their entirety. In addition to these recordings, 160 other hearings were attended by 24 attorneys, designated by plaintiffs, who were allowed to take notes. This brings to a total of nearly 1400 the number of hearings monitored by plaintiffs.

For the above reasons, and for the reasons set forth in defendants' previous motions to terminate the compelled recordation of the adult authority hearings, defendants again request that the compelled recordation of these hearings be terminated.



### Conclusion

For the above reasons defendants respectively request that plaintiffs' motion to modify the court's order of August 12, 1974 be denied, and that defendants requests for modification of said order be granted.

Dated: November 20, 1974.

Evelle J. Younger
Attorney General of the
State of California
Jack R. Winkler
Chief Assistant Attorney
General—Criminal Division
Edward P. O'Brien
Assistant Attorney General
John T. Murphy
Deputy Attorney General
/s/ Karl S. Mayer
Karl S. Mayer
Deputy Attorney General

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[Exhibit A]

(The text of Exhibit A, the district court's order filed August 12, 1974, is omitted in printing this appendix and appears in the printed Petition for Writ of Certiorari, Appendix, pages xxix-xxxiii.)

[Exhibit B]

A. B. No. 74/41
(Cancel 12-31-74)

State of California
Department of Corrections
Sacramento 95814

August 15, 1974

Administrative Bulletin No. 74/41

To: Wardens and Superintendents; Regional Administrators; Departmental Staff

Subject: Access to Inmate Records

In the case of *In re Olson* (37 Cal.App.3d 783), the Court of Appeals held that an inmate and the inmate's counsel have the right to access to the inmate's departmental records, subject to a specific claim of confidentiality by the Department which has the burden of showing the necessity for maintaining such confidentiality.

The Department's policy and procedural guidelines for implementing the court's order are set forth in a complete revision to Section IR-I-08 of the Inmate Records Manual. Because these policies and procedural directions apply to all personnel of the Department and its component agencies, revised Section IR-I-08 is included as a supplement to this bulletin to assure its widest possible dissemination to all personnel.



Personnel who have used or who are currently using prior draft copies of IR-I-08 for procedural direction and planning or training purposes should be immediately informed of this official version as a number of policy and procedural directives have been changed. A major change involves the policy of providing copies of nonconfidential file documents to inmates, parolees and attorneys. Copies will now be provided on an "as needed" basis rather than "as desired."

This official version of IR-I-08 should be used in in-service training sessions for all personnel, and as an on-the-job training guide for all personnel who will be assigned to perform the specific functions described in the procedures.

In a separate letter, wardens, superintendents and parole regional administrators will be informed of the positions allocated for implementation of the procedures involved in complying with the *Olson* decision. This is to reaffirm directions contained in that letter: the allocated positions are to be utilized exclusively in the file examination process, with no involvement of other positions, except as required for coordination, guidance, and supervision of the process at those institutions where Correctional Counselor II and Records Officer II positions will not be allocated for those purposes.

Administrative Bulletin No. 73/50, Validity of Case Information has been incorporated in the attached revision to IR-I-08 and Administrative Bulletin No. 73/50 is hereby cancelled.

Please see that all personnel are informed of the contents of this bulletin and its attachments. This bulletin is cancelled effective December 31, 1974.

/s/ R. K. Procunier
R. K. Procunier
Director of Corrections

Attachments

UNIFORM INMATE RECORD PROCEDURES

[CHAPTER I—IR-I-08—REVISED]

IR-I-08 ACCESS TO INMATE RECORDS

A. *Examination of Inmate Central File*

The following procedures set forth Departmental policy concerning the disclosure of an inmate's records to the inmate, the inmate's attorney, persons certified to act for the inmate's attorney, and to other agencies and persons who are not employees of the Department of Corrections, the Adult Authority, the Women's Board of Terms and Parole, and the Narcotic Addict Evaluation Authority.

The terms "inmate", "inmate record" and "inmate file" as used in this section apply to all persons who are or have been committed to the custody of the Director of Corrections, including parolees and dischargees, regardless of that person's present status, and to the central file of that person, unless otherwise identified or described as another file or record.



A.1 *General Public*

Inmate records are not public records and information contained therein will not be disclosed to the general public. Various statutory provisions specifically exempt records prepared for correctional purposes from disclosure to the public.

A.2 *Public Agencies*

Public agencies dealing directly with the treatment, training and release placement of inmates and law enforcement agencies may be given access to those inmate records related to the function of that agency.

A.3 *Research Personnel*

Persons involved in a Departmentally-approved research program or project may be given access to inmate records for review only. They will not be permitted to make or retain copies of records or documents that identify the inmate.

A.4 *Courts*

In response to a request or order from a court to produce the inmate's records or files in court, only the inmate's central file need be produced unless the court orders other inmate records by title.

Prior to producing the inmate's central file in court, the file will be reviewed by appropriate

staff and confidential information will be placed in a separate section of the file as described in A.5, Subdivisions 2, 3 and 4.

Both sections of the inmate's central file will be reviewed with the deputy attorney general or the district attorney who will have the option of suggesting the removal of additional material from the main body of the central file and placing it in the confidential case records folder. The additional material will be added to the list of confidential case records, as described in Section A.5.

In any case where material has been designated as confidential by Departmental personnel, the attorney general's office will ultimately be responsible for seeing that the Department's position is represented in court. Local arrangements may be made with the district attorney also.

Custody of an inmate's central file will not be surrendered by Departmental personnel under any circumstances. Requests or demands for the file will be immediately referred to the Departmental Legal Counsel.

A.5 *Inmate*

Upon written request and in keeping with the following Departmental requirements and the procedures established at each institution and parole regional office where central files are maintained, inmates will be permitted to review



the content of their respective files. An inmate may not review or be given access to another inmate's file.

A.5.1 *Staff Screening of File Content*

Before the inmate's examination of the central file, the entire content of the file will be screened by a staff member designated by the warden/superintendent or regional parole administrator.

This screening process should be assigned to staff who are casework specialists and sufficiently experienced and knowledgeable to determine from document content what is or is not confidential information. Non-casework personnel, such as Records Officers, will not be used for this function.

The purpose of this screening will be to identify all documents in the file which should not be disclosed to the inmate, and to prepare a list of such documents, describing the general nature of each document and the reason for classifying it as confidential, as described in Section C of this procedure. Care must be given to the wording of reasons for confidentiality and in describing the general nature of a confidential document in order to avoid disclosure of the confidential elements of the document.

The employee screening the file may use a copy of the confidential case records form, attached to this procedure as Exhibit

"C" (Confidential Case Records), as a worksheet. The listing will be typed. A typewritten copy of the list will be given to the inmate at the time of the inmate's examination of the nonconfidential portion of the file.

A.5.2 *Separation of Confidential and Nonconfidential File Material*

The original typewritten copy of the list will be retained in the confidential case records section of the file as a permanent record of material withheld from disclosure to the inmate at the time of the examination of the file by the inmate.

The list of confidential case record information will be used by the Records Office to separate the designated confidential documents and information from the main body of the central file and to place such material in a separate confidential case records section of the file as described in Subdivision A.5.3 of this procedure.

If the separation of confidential material and information from the main body of the central file results in a significant break in the continuity of subject matter or the relocation of a document that is normally required to be filed in a specific location; e.g., permanent addenda material, the Records Office will insert a notice of the document's relocation in its regular routine place. Notice form is shown in Exhibit "D" (Notice), attached to this procedure.



The format of Exhibit "D" (Notice), may be applied to a CDC chrono form 128-B or to the lower portion of an otherwise blank page, corresponding to the size of the document removed from the main body of the central file.

Staff who use the central file should not assume that the absence of such notices in the main body of the file indicates that no significant information has been relocated or initially filed in the confidential case records section of the file. The confidential case records section of the file should be examined to determine if it contains any information or documentation pertinent to the reason for the review of the file.

A.5.3 *Preparation of Confidential Case Records Folder*

Confidential case records will be placed in a letter-sized manila folder labeled "Confidential Case Records—Central File" and properly identified by the inmate's name and number.

The confidential case records folder will be attached to the inside of the central file back cover by means of a drop device and Acco fasteners. This will permit the folder's secure retention in the central file for its use by staff, and permit the folder's removal from the main file and retention by the Records Office when the nonconfidential portion of the file is made

accessible to persons who are not authorized to review the confidential portion of the file.

Until such time as central file folders are restructured at the time of initial preparation to include a confidential case records section, the responsibility for preparation of the confidential case records folder described in this procedure will rest with the staff of the reception center or of the institution where the first instance arises where confidential information must be separated from the main body of the file in order to facilitate the examination of the file by an inmate or an inmate's attorney.

A.5.4 *Retention of Confidential Case Records Folder as A Permanent Part of the Central File*

Upon completion of any action requiring the preparation of a confidential case records folder, the content of the folder will not be returned to its former location in the main body of the central file. Exceptions may be made on a temporary basis to facilitate special needs, i.e., confidential Adult Authority addenda and permanent addenda.

Once established, the confidential case records folder will be utilized by the Records Office personnel for the filing of all subsequent documents designated as confidential according to Section C of this procedure and as otherwise identified and labeled as confi-



dentia' by the staff member responsible for its origin or its processing prior to transmittal to the Records Office for filing.

The existence of a confidential case records file folder will not eliminate the need to thoroughly screen the entire central file before making it again available for review by the same individual at a later date or by another individual who is not authorized to review confidential case record information. The procedures described in subdivisions A.5.1 and A.5.2 will be followed prior to each review of the file.

A.5.5 *Supervision of Inmate and File*

The inmate examination of the file will be conducted under direct and continuous supervision at all times while the file is accessible to the inmate.

The purpose of this supervision will be to: (1) Prevent the destruction, mutilation or alteration of the file and its contents; (2) provide the inmate with an immediate response, whenever possible, to questions concerning information in the file; (3) update the validity of case information as deemed necessary; and (4) reduce the need for inmate appeals.

A.5.6 *Frequency of Inmate File Examination*

The Department's ultimate goal is to permit an inmate to review the central file, upon request, as a legitimate need arises or at

six-month intervals on a routine basis. Until such time as staff are available for this purpose and the initial demand for file examination has abated, inmate examination of their files must be scheduled on the basis of an event or action for which the inmate has a need for the information in the file. This would ordinarily be to prepare for the event or to determine the reason for action taken. Priority events and actions would be:

(a) Parole prerevocation and revocation hearing. (When a parolee is in jail custody at the time of the hearing, examination of the central file will be postponed until the parolee is released from custody or is returned to an institution.)

(b) Parole date rescission consideration hearings, when a personal appearance is scheduled.

(c) Parole consideration hearings.

(d) Other events or actions, when fairness requires that the inmate have an opportunity to examine the file.

A.5.7 *Time Permitted for Inmate File Examination*

A reasonable period of time will be permitted for the inmate's examination of the file,



based on the reason for the examination and the volume of material to be reviewed. In order to accommodate the greatest possible number of inmates, lengthy discussion of controversial file information should be deferred to a more convenient time after completion of the file examination.

A.5.8 *Note Taking During Inmate's Examination of File*

Inmates may take notes during their examination of their files. Notes must be limited to brief references to specific documents the inmate intends to question or discuss with staff after completion of the file examination, and specific documents the inmate may desire to have copied.

Inmates will not be permitted to make verbatim copies of complete documents or lengthy portions of documents during the file examination process.

A.5.9 *Questions and Issues Arising from File Examination*

Whenever possible, the staff member supervising the inmate's examination of the file will answer questions that arise during the file examination process. If the staff member supervising the inmate's examination of the file is not the caseworker who prepared the file for the inmate's examination, unanswered

questions and unresolved issues will be referred to the caseworker. If the caseworker cannot answer the inmate's questions or resolve the issue to the inmate's satisfaction, the matter will be referred to the staff member designated as the file examination coordinator. If the matter is unresolved to the inmate's satisfaction at this level, the inmate may appeal to higher authority through the established inmate appeals procedure.

A.5.10 *Copying Documents for Inmates*

Disclosure of a filed document does not automatically entitle the inmate to a copy of the document. To the contrary, disclosure will in most instances obviate any need for a copy to be given to the inmate.

Inmate requests for copies of documents in their files will be initially referred to the caseworker who prepared the file for examination.

The caseworker will approve the request only when a reasonable and immediate need exists for copies, i.e., pending litigation with due dates, appeals to the Director, etc.

When preparation of a copy has been approved by the caseworker, copy service will be provided without charge to the inmate.

A.5.11 *Inmate Retention of Documents*

Inmates will be allowed to keep or personally dispose of any copy of a nonconfi-



dential or nonrestricted Departmental document.

Regardless of its origin, inmates will not be permitted to possess any document which if retained by the inmate would pose an undue threat to the safety and welfare of inmate, or to another individual, or to the security and control of an institution. Such material will be placed in the inmate's unissued personal property, to which the inmate will have access under supervision, as described in DR-1104 of the Rules and Regulations of the Director of Corrections.

A.6 *Attorney*

The nonconfidential portion of an inmate's file will be made available to an attorney acting on behalf of the inmate or the attorney's designated representative as defined in DP-2705 of the Rules and Regulations of the Director of Corrections, upon written request, with the written consent of the inmate and in keeping with the following policy and procedure.

A.6.1 *Attorney Access to Inmate Central Files*

The inmate's attorney and an attorney's representative will be given access to the inmate's file only at the institution or parole regional office where the file is maintained. Requests to have the entire file or portions of the file copied and mailed to an attorney will not be honored.

A.6.2 *Joint Inmate/Attorney Examination of File*

The inmate and the inmate's attorney may participate in a joint examination of the inmate's central file only under direct and continuous supervision of a designated staff member, and with the prior approval of the warden, superintendent or regional parole administrator. Staff used for such supervision will not participate in any discussion of the file content with the inmate and the attorney. The primary purpose of such supervision will be to maintain the security and integrity of the file.

If the inmate and the inmate's attorney desire to discuss the inmate's case in private, they may do so in a private interview as provided for in DP-2705 of the Rules and Regulations of the Director of Corrections. Any copies of file material in the possession of the inmate and the attorney may be taken to a private interview. However, the central file will not be allowed in any interview situation where its security and integrity cannot be controlled by staff.

A.6.3 *Acknowledgment and Consent for Attorney Representation*

The attorney's acknowledgment that he is acting on behalf of the inmate and the inmate's written consent for the attorney to



examine the file is required before an attorney may examine the file. Sample acknowledgment and consent forms are attached to this procedure as Exhibit "A" (Consent for Attorney of Record to Examine Records) and Exhibit "B" (Acknowledgment of Attorney's Agreement to Represent).

A.6.4 *Scheduling Attorney Examination of Inmate Files*

Requests from attorneys to examine an inmate's central file will be referred to the staff member designated as the coordinator of the file examination process.

The attorney's examination of the file will be approved and scheduled on the basis of the attorney's apparent need to examine the file and the availability of staff to accommodate the request. This may require establishing a waiting list for attorneys to examine files.

Requests should be received by the file examination coordinator at least two weeks in advance of an attorney's desired date to examine a file. Advance notice is required to avoid conflict with other scheduled use of the file and to assure the availability of staff to prepare the file for examination and to supervise the examination. When a requested date cannot be accommodated, the attorney is to be notified and an available date given if possible.

Exceptions to the above will be made when an action or event is scheduled by the Department or the parole authority on short notice and the attorney has a need to examine the file in order to prepare for the event, e.g., parole revocation hearings.

A.6.5 *Staff Screening of File Content, Listing of Confidential Material and Preparation of Confidential Case Records Folder*

Before an attorney's examination of the inmate's central file, the pre-examination screening process described in A.5, Subdivisions 1, 2 and 3 of this procedure will be followed, as well as the directions for retention of the confidential case records folder, as described in Subsection A.5.4.

The confidential case records list of file material that will not be disclosed to the attorney will be shown to the attorney prior to his examination of the nonconfidential portion of the inmate's file, and his signature requested on the form. If the attorney refuses to sign the form, the staff member supervising the examination of the file will so note on the form and allow the attorney to examine the file.

The purpose of this listing of withheld material is twofold: (1) It informs the attorney that certain information has been withheld, and makes the same information available



to the court if the attorney challenges the Department's assertion of confidentiality; and (2) it refutes any subsequent claim that the Department has waived the privilege of confidentiality by making the entire file available for examination.

A.6.6 *Supervision of Attorney Examination of Files*

Attorney examination of an inmate's central file will be supervised at all times by caseworkers or correctional officers designated for this purpose. Records officers and Records Office staff will not be used to supervise attorney examination of files.

The purpose of this supervision is primarily to preserve the security and integrity of the file and its contents. No attempt should be made to debate any question relative to the content of documents or to justify or explain Departmental actions or decisions reflected in the file. Courtesy should be shown in referring the attorney to proper authority if he desires such information, and in answering uncontroversial questions relative to the purpose of forms or documents.

A.6.7 *Copy Service for Attorneys*

Attorney requests for copies of documents in an inmate's file will be referred to the caseworker who prepared the file for ex-

amination. Such requests will be approved only after the document has been disclosed to and examined by the attorney and the attorney has expressed a reasonable need for a copy of the document.

When preparation of a copy has been approved by the caseworker, copy service will be provided without charge to the attorney.

A.6.8 *Charges to Attorneys for Staff Services*

There will be no charge to an inmate's attorney for the cost of staff time expended in preparing a file for examination or for supervising the examination of files during the institution's and parole region's regular office hours.

Ten dollars an hour will be charged for preparing a file for examination and for supervising the file examination when such service is required and is authorized by the warden, superintendent or regional parole administrator at times other than regular office hours. The attorney should be informed of the cost factor if requesting to examine a file at such a time.

A.6.9 *Attorney Examination of Prospective Inmate Witness Files*

Requests from an attorney to examine the file of a prospective inmate witness, and court orders for the disclosure of prospective



inmate witness files to an attorney, will be referred to the Department's Legal Counsel as indicated in D.4 of this procedure.

B. *Examination of Records Other Than Inmate Central Files*

The procedures set forth in the preceding Section A, apply only to the inmate central file and the information contained in that file. All requests to examine any other institutional file or record maintained separate and apart from the inmate central file will be handled in the following manner.

B.1 All requests will be evaluated by the Correctional Counselor II assigned to coordinate and supervise the file examination process or by a staff member at the Program Administrator level or higher authority. This evaluation will be for the purpose of determining the validity of the inmate's/attorney's reason or need to examine the record or file. If there does not appear to be a "need to know", the request will be denied. The requester should be informed that an appeal of the decision may be processed through established procedures.

B.2 When a request appears to be based on a valid reason or "need to know", the Correctional Counselor II, Program Administrator or staff of higher authority will forward the request along with their evalua-

tion of the "need to know" to the Deputy Director, Program and Policy Division.

B.3 Institution division or section heads responsible for maintaining the record of file in question will not be required to review the file to determine what should or should not be disclosed unless instructed to do so by the Deputy Director, Program and Policy Division, through the warden or superintendent.

B.4 When so ordered, the division or section head or his designated representative will review the file and provide for the separation and withholding of confidential information before making the file available for examination.

B.5 As with any information in the central file, the confidentiality of information contained in other records or files must be justified on the basis of content only, and not upon its location or origin. Reference: Section C, Confidential Central File Information.

C. *Confidential Central File Information*

The Department of Corrections and component agencies will disclose to an inmate and to the inmate's attorney all documents in the central file pertaining to the inmate, upon request, except as specified in these procedures.

If, in the Department's judgment, the security and control of an institution will be jeopardized



or any individual will be exposed to undue risk of harm by disclosure of a particular document, the Department will refuse to disclose that document and will make known to the inmate or the inmate's attorney the general nature of the document and the reason for nondisclosure.

C.1 *Confidentiality by Content*

In determining what should and should not be disclosed, the determination must be based on the information contained in the document, and not upon the document's title, label, form number or origin. The few exceptions to this general rule are specified in Section C.3 of this procedure.

The following types of information will be classified as confidential and will not be disclosed except as provided for in these procedures.

C.1.1 *Information That Would Endanger Institutional Security*

Examples of such information are maps, diagrams and descriptions of the physical plant and security facilities, or documents relating to the details of escape plots and plans.

C.1.2 *Information That Would Endanger Other Persons*

Information which if known to the inmate or to other inmates would endanger the safety of any other persons, such as informants.

Caution must be exercised in describing the general nature of such documents and the reasons for nondisclosure, to avoid giving broad clues as to the confidential information in the document or otherwise inadvertently endangering the safety of another individual.

C.1.3 *Promised or Implied Confidentiality*

The fact that nonconfidential information is received under a promise or implied promise of confidentiality or recorded on a form generally used for confidential information does not make it confidential, nor justify a refusal to disclose the information. Exceptions may be made to this general rule if deemed necessary because of the sensitive nature of the information when it is possible to clearly demonstrate that the information would not have been received but for the promise of confidentiality.

C.2 *Medical, Psychiatric and Psychological Reports and Evaluations*

Medical, psychiatric and psychological reports and evaluations in an inmate's central file may or may not have been classified as confidential or nonconfidential by their originators. When such reports have not been so classified, the caseworker assigned to prepare the file for examination by the inmate or the inmate's attorney must do so.



When such reports meet any of the following justifications for confidentiality, the caseworker will so classify the document without reference to or consultation with medical, psychiatric or psychological services staff.

(a) Could cause significant psychological disturbance to the inmate.

(b) Impair the effectiveness of the treatment and rehabilitative process.

(c) Interfere with or prejudice the inmate's future relationship with staff, family or friends.

(d) Increase the inmate's potential for aggressive, violent or bizarre behavior.

(e) Jeopardize the security of an institution.

(f) Jeopardize the safety and welfare of the inmate or any other individual.

If the caseworker has any other reason to believe the report or evaluation should not be disclosed to the inmate or to the inmate's attorney, the caseworker may consult with appropriate medical, psychiatric or psychological services staff in making a final determination.

If the caseworker determines that the report or evaluation does not require a confidential classification, the caseworker will label the report as nonconfidential and sign and date the notation.

### C.3 *Confidential by Regulation or Statute*

There are a few items of information in an inmate's file which may not be disclosed by virtue of a specific prohibition. Those few items are described as follows:

#### C.3.1 *Staff Correspondence with Legal Counsel*

All correspondence between Departmental staff and the Attorney General, a Deputy Attorney General, district attorneys and their staff, and the Department's Legal Counsel, relating to litigation involving the Department is confidential on the grounds of attorney-client privilege.

Such correspondence will not be disclosed to an inmate or to the inmate's attorney. If it is necessary to place such correspondence in the inmate's file, it will always be filed in the confidential case records folder and never in the main body of the file.

#### C.3.2 *CDC Form 274 and Attachments, Summary Statements, Recommendations Received*

Pursuant to California Penal Code Section 3046, the statements or views submitted by the judge, the district attorney and sheriff pursuant to Section 1203.01, Penal Code, or in response to notices given under Sections 3022 and 3042, Penal Code, and recommendations



of other persons interested in granting or denying of parole are *all* confidential information if the inmate has been sentenced to an express term of life imprisonment.

If the inmate is sentenced to other than an express term of life imprisonment, the documents are not confidential unless they contain information described in C.1, Subsections 1, 2 and 3.

#### C.3.3 *CDC Forms 199-A, B and C, 203, 204-A, 205-A and 207-A*

Reports received from arresting officer, jailer, transporting officer, former employers, spouse, parents and friends.

The information received on these form questionnaires is not confidential on the basis of the form number. However, care should be exercised in screening such form responses to avoid disclosure of information which would endanger the informant or other persons. See Section C.1.3 regarding promised or implied confidentiality.

Reception centers will delete, by blacking out, any blanket statement of a promise of confidentiality from existing supplies of questionnaire forms. Future printing of forms will omit such blanket statements.

C.3.4 *CII Transcript ("Rap Sheet") Arrest and Disposition Record*

Pursuant to Sections 11076, 11124 and 11125 of the California Penal Code, the CII report may be examined by the inmate and the inmate's attorney. They may make a written summary or take notes in their own handwriting, but may not be given a copy of the report by personnel of this Department.

Copies of the report obtained by the inmate through the court or his attorney may be retained by the inmate.

C.4 *Cumulative Case Summary*

C.4.1 Cumulative case summaries prepared on all inmates received by the Department prior to the implementation date of these procedures require special screening before being disclosed to the inmate or the inmate's attorney. If confidential information can be practically separated from the summary, the nonconfidential portion of the summary may be disclosed.

C.4.2 Cumulative case summaries prepared on new intake and returned parole violators received by the Department after the implementation date of these procedures will be structured to relocate confidential information



in a confidential summary supplement which will be filed in the confidential case records folder in the central file.

The staffing page will contain the notations: "Confidential Information:" followed by "None" or "See Confidential Supplement". Where so structured, the nonconfidential portion may be disclosed to the inmate or to the inmate's attorney at the time of any future examination of the file.

C.4.3 *Crime Partner's Cumulative Case Summary*

The prohibition against disclosing an inmate's case file to another inmate or to another inmate's attorney, as stated in Section A.5 of these procedures, applies as well to the cumulative case summary or other case file information of an inmate's crime partner.

D. *Classifying Confidential File Information*

The Departmental policy to disclose all nonconfidential file information to the inmate to whom it pertains is not limited to the material already in the file, or only to disclosure after the information has been placed in the inmate's file. The application of this policy begins with the origi-

nator or initial receptor of any information which will be placed in an inmate's file. This policy must be understood and applied by all staff who originate any report, evaluation, correspondence, or other document intended for an inmate's file, or who may be the determining authority in deciding whether such documents are to be included in an inmate's file.

D.1 *Material Originating with Staff*

All personnel of the Department and of the parole authorities who originate any report, evaluation, correspondence, or other documentation intended for inclusion in an inmate's central file are responsible for determining whether that information should or should not be classified as confidential information.

D.1.1 When the originator determines that the information is of a confidential nature, it is the originator's responsibility to explain the reason for such determination within the narration of the document itself or upon the document, and to conspicuously label the subject title as "Confidential". If only a portion of the information needs to be classified as confidential, that information should be documented separately.

D.1.2 The confidential classification and labeling of any document, except



those requiring confidentiality by statute, will be reviewed, evaluated and approved by appropriate staff before being routed to the Records Office for filing. Appropriate levels of review and approval are: (a) The inmate's assigned caseworker for any document originated by staff below the Program Administrator level; (b) the casework supervisor when the document is originated by the caseworker; and (c) such other staff as may be designated by the warden, superintendent or parole regional administrator.

D.2 *Material Received from Outside Sources*

Staff who receive, review, evaluate or respond to information intended for inclusion in an inmate's central file from agencies and persons not employed by the Department or parole authorities are responsible for determining whether that information and their response should or should not be classified as confidential. If so classified, the reasons should be explained in or on their evaluation and response and a confidential label should be applied to the document received and to their response before the material is routed to the Records Office for filing.

D.3 *Review of Existing Central File Material*

The case file review procedures established to maintain the validity of case information apply also to the appropriateness of previously applied confidential classification of information in the file, to classifying and labeling of other information as confidential where the need for such classification and labeling exists in light of current situations or circumstances, and where the need for a confidential classification may have been overlooked by the originator and in pre-filing review.

D.3.1 The reviewer should not remove or modify the confidential/restricted classification of any document which is designated as confidential or restricted by law, as described in Section C.3 of these procedures. All other documents in the file must be evaluated on the basis of content and the expressed or implied intent of its originator or authority of origin.

D.3.2 When the reviewer disagrees with the expressed or implied intent of the originator as to the need for confidentiality, the reviewer will, if possible and practical to do so, obtain the concurrence of the originator before applying or removing a confidential classification.

D.3.3 When a difference of opinion cannot be resolved with the originator of a



document, or when it is no longer possible or practical to obtain the concurrence of the originator, the reviewer will refer the matter to a staff member at the Program Administrator level or higher authority for a decision before removing or applying a confidential label to the document in question.

D.3.4 Where circumstances or situations warrant the removal or application of a confidential classification, and with the approval of the proper authority to do so, the reviewer will mark the document: "Reclassified as Confidential (or Non-confidential), see explanatory memo or chrono dated ....." and sign the notation.

D.4 *Referrals to Departmental Legal Counsel*

D.4.1 *Court Orders for Disclosure or Cause*

When an institution or regional parole office receives a court order to disclose inmate records to an inmate, an inmate's attorney, or to the court, or a court order to show cause why an inmate's record should not be disclosed, the matter will be immediately referred to the Department's Legal Counsel and through the counsel's office to the Attorney General, if necessary, to determine what action should be taken.

D.4.2 *Attorney Request to Examine Prospective Inmate Witness Files*

Requests from an attorney to examine the file of a prospective inmate witness in an action pending against another individual, including staff of the Department of Corrections or its component agencies, will be referred directly to the Department's Legal Counsel for response to the requester.

D.5 *Policy and Procedural Questions*

Any questions by staff or other individuals regarding the application of these procedures should be directed to the Deputy Director, Program and Policy Division.

E. *Validity of Case Information*

E.1 *Need for Adequate Case Information*

Throughout the period of commitment to the Department of Corrections an inmate or parolee is subject to decisions that affect his or her relative freedom and opportunity for advantageous custody and programming. These include:

(a) In the institution, decisions to tighten custodial control to impose or continue segregation, and to restrict from program opportunities.

(b) In the term-fixing and paroling processes, decisions to grant or to not grant parole,



or to rescind previously granted parole.

(c) During parole, decisions to modify conditions and length of parole.

These are decisions to be made on the basis of adequate and correct information.

The purpose for this policy is to insure a valid informational basis for decisions affecting inmates and parolees. It is not intended that less information will be placed in, or that any information will be removed from, any file. It is intended to insure that all information be substantiated, an estimate of its reliability documented, and that periodic reevaluation of the estimated reliability be made.

E.2 *Case Information Principles*

E.2.1 The purpose of placing information in an inmate/parolee file is to provide an adequate, accurate and current basis for effective decisions by institutional and parole staff and the paroling authorities in accordance with the needs of the community, the individual and the institution.

E.2.2 It is the responsibility of each institution head and regional administrator to insure that the information developed and placed into the inmate/parolee file and maintained by staff is as complete, accurate and current as possible.

E.2.3 Each inmate and parolee should be aware of the information placed in his or her file unless it is vital that an item of information be kept from the individual. Each inmate or parolee should have the maximum feasible opportunity to explain or deny any information placed in the file, and to have his or her version or explanation recorded with the inforformation.

E.2.4 When critical decisions are to be made affecting an inmate's or parolee's present status, the individual must be made aware of all nonconfidential information upon which the decision will be based. The individual must also have the opportunity to speak to the validity of the information as he or she sees it and to have their views considered in the staff's determinations. The individual will be given the opportunity to seek review of any decision through established appeals procedures.

E.2.5 Informing the inmate or parolee of nonconfidential information upon which a decision will be or has been based does not necessarily require that the individual be given a copy of the documentation, except as specified in Section E.3 of this procedure.



In most instances the individual's need to know may be met by staff's sharing and exchanging information with the individual on a verbal basis before and after a decision is made.

E.3 *Copies of Documents to be Given to Inmates/Parolees.*

A copy of the following listed documents will be given to the inmate or parolee to whom they pertain whenever the content is determined to be of a nonconfidential nature:

(a) *CDC 128a; Disciplinary Chronos,* as provided in Chapter 4, Article 5 of the Rules and Regulations of the Director of Corrections.

(b) *CDC 115, Report of Violation of Institution Rules,* and all supplemental reports of a nonconfidential nature, as provided in Chapter 4, Article 5 of the Rules and and Regulations of the Director of Corrections.

(c) *CDC 272-B, Notice of Reasons for Denial of Release,* and other form notices to inmates or parolees of events or actions scheduled or taken by parole authorities.

(d) *Reports to Adult Authority,* as described in Chapter 9 of the Manual of Procedure for the Cumulative Case Summary and as approved by other parole and release authorities.

(e) *128-G, Classification Chrono,* when the classification committee's intent is to notify the inmate of conditions or contingencies imposed by parole authorities on release consideration. Reference: Classification Manual Chapter CL-IV-08. Copies of classification committee chronos will also be given to the inmate when a classification committee's determinations or action will have a major effect on the inmate's present or future status, e.g., custody raised to a higher classification; removal from desired program activity or work assignment; transfer under segregated status or to a location objected to by the inmate.

(f) *CDC 101, Work Supervisor's Report.* A copy is to be given to the inmate at the time such reports are prepared. The original copy intended for the inmate's file should be signed by the inmate to acknowledge that he or she has been informed of its content.

Wardens, superintendents and parole regional administrators will be allowed considerable discretion in determining what additional nonconfidential information may be given to inmates and parolees by the originators of such documents. However, consideration should be given to the clerical, filing, routing and distribution workload involved.



E.4 *Validating Previous Recording*

The inmate's central file must be reviewed by a responsible staff member at specified intervals to insure the current validity of evaluations and information in the file. The following events require such review and evaluation.

(a) Prior to transfer of an inmate to another institution.

(b) At the time of preparation of a pre-board report and pre-board review.

(c) When a determination is made to extend an inmate's confinement in segregated status beyond six months.

E.5 *Updating Validity of Previous Records*

No information may be deleted from an inmate's file. When an earlier statement appears to be erroneous or a more accurate assessment of its reliability can be made, staff must make corrective entries. Any information believed to be no longer accurate or relevant must be marked as such and cross-reference made to an explanatory document. The individual should be informed of the corrected or reevaluated information.

E.5.1 It is the responsibility of staff members to devaluate obsolete documentation by prominently marking the invalid document, "Reappraised Information. See explanatory memo/chrono dated ..... .....", and sign the notation.

E.5.2 When reappraised information is located in a permanent part of the Cumulative Case Summary, such as the reception center recording, it will be marked with an asterisk and footnoted on the summary master. The annotated page will be duplicated and inserted in place of the obsolete pages in all copies of the Cumulative Case Summary.

E.5.3 In voluminous files which have accumulated over many years, only recent recordings and documentation upon which current decisions may be based need to be reviewed, except as derogatory labels or information must be traced back to its recorded origin and all documents properly noted if reevaluation cross-reference is made.

E.5.4 Use of derogatory and stereotyped labels such as "militant", "revolutionary", "agitator", etc., should be avoided. When there use is deemed necessary, such terms must be accompanied by an adequate explanation of the supporting reasons.

E.5.5 There are circumstances in which the inmate or parolee should not be informed of the information upon which a decision or action is based until the individual has been placed in secure custody. Examples are, when an inmate must be



placed in segregated status pending investigation and evaluation of custodial risk, and when a parolee/outpatient is placed in jail custody for similar reasons. However, the matter should be discussed with the individual at the earliest opportunity.

E.6 *Removal of Documents from Inmates/Parole Files*

Wardens, superintendents and regional parole administrators are authorized to approve the removal and destruction of material placed in an individual's file by staff of their institution or region when it can be positively determined that the information should never have been placed in the file. This authority does not apply to any material that was prepared for the file or placed in the file before the inmate's or parolee's reception at the location under the warden's, superintendent's or regional parole administrator's jurisdiction. Neither does this authority extend beyond the inmate's/parolee's transfer from that location. The authority to approve removal of material from an inmate's/parolee's file will not be delegated to subordinate staff.

Exhibit "A"

CONSENT FOR ATTORNEY OF RECORD TO EXAMINE RECORDS

My attorney, ....., is hereby authorized by me to act in my behalf, and I hereby grant my attorney permission to examine such records as may be available pertaining to my case and my incarceration and to be given copies of any document or information in my records which may be disclosed to my attorney.

| | |
|---|---|
| ..... | ..... |
| Staff Witness | Inmate's Signature |
| ..... | ..... |
| Date | Number |

---

Exhibit "B"

ACKNOWLEDGMENT OF ATTORNEY'S AGREEMENT TO REPRESENT

I declare under penalty of perjury that I am an attorney at law, licensed to practice in the State of California, and that I am acting in behalf of .....in a matter pertaining to .....

Inmate's Name and Number

Nature of Cause

.....

Case Name, Number and Court, if applicable

| | |
|---|---|
| ..... | ..... |
| Staff Witness | Printed Name |
| ..... | ..... |
| Date | Signature |



Exhibit "C"

CONFIDENTIAL CASE RECORDS

NAME: ..... NUMBER .....

Central File Examination Requested by:

☐ Person Named ☐ Attorney of Record ☐ Court

In response to the above request, the below listed material has been deemed by the Department of Corrections to be of a confidential nature for the reasons given and will not be disclosed to the person named or to the person's attorney of record, except by order of an appropriate court.

I have reviewed the file of the above named person and have authorized the withholding of the listed material from examination by the named person or the person's attorney of record named below.

| | | |
|---|---|---|
| ..... | ..... | ..... |
| Signature of CDC Official | Date of Review | File Location |

I acknowledge receipt of a copy of this listing of material withheld from my examination.

| | |
|---|---|
| ..... | ..... |
| Signature | Date |

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Exhibit "D"

NOTICE

..... An item

Inmate's Name and Number

has been removed from the file at this point and placed in the confidential case folder.

| | |
|---|---|
| ..... | ..... |
| Name | Date |

[Exhibit C]

[The text of Exhibit C, the district court's order filed June 20, 1974, is omitted in printing this appendix and is found in the printed Petition For Writ of Certiorari, Appendix, pages xv-xvii.]

[Proposed Order Omitted In Printing, Statement of Service Omitted In Printing.]



In the United States District Court
Northern District of California

Civ. No. 72-2088 SAW

John Van Geldern, et al., Plaintiffs,

vs.

Henry W. Kerr, et al., Defendants.

[Filed Dec. 3, 1974]

ORDER

The plaintiffs have moved for enforcement of this Court's Order dated August 12, 1974, for sanctions and for clarification of said Order. Defendants have countermoved for sanctions and other relief.

The motions having duly come on for hearing, all parties having been heard, and good cause appearing therefor.

IT IS HEREBY ORDERED that the Order of this Court dated August 12, 1974, is incorporated by reference into this Order.

IT IS HEREBY ORDERED that the central files made available to plaintiffs in accordance with the Order dated August 12, 1974, shall include any and all material, wherever located, which is available to or could be available upon request to Adult Authority members or hearing representatives in making parole determinations. The term "central files" shall include

all files of a prisoner in the California Prison System, however designated, including but not limited to, "investigative files," "administrative files," or any similar designations. All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection.

IT IS FURTHER ORDERED that all material previously removed or withheld by defendants from files already requested by plaintiffs shall be made available to plaintiffs' counsel for inspection within ten days.

IT IS FURTHER ORDERED that plaintiffs, in their inspection of central files, may be assisted by no more than two persons (other than plaintiffs' attorneys) who shall be supervised by plaintiffs' attorneys, and who shall be certified law students in good standing in California law schools, or members in good standing with the State Bar of California.

Such persons shall be permitted physically to inspect all of the files made available to plaintiffs' counsel under this Order and the Order dated August 12th, 1974.

IT IS FURTHER ORDERED that inspection of central files shall take place under such conditions as to provide a reasonable opportunity for plaintiffs' counsel and their designated assistants, to carry out



their inspection in a businesslike manner during normal working hours.

IT IS FURTHER ORDERED that plaintiffs' counsel including any assistants, shall not alter, add to or destroy any file or any part thereof.

IT IS FURTHER ORDERED that the tape recordings of parole consideration hearings provided for by the Order of this Court dated August 12th, 1974, continue unobstructed, and that such recordings include any and all utterances of hearing officers or other prison officials present before, during and after the time the inmate enters the hearing room.

IT IS FURTHER ORDERED in reference to the Order of this Court dated August 12th, 1974, that:

1. Defendants shall make available to plaintiffs, upon plaintiffs' request, the central file of any inmate within the California Prison System, whether or not hearings have been tape recorded for such inmate, up to a maximum of 200 such files. Files previously made available shall be counted toward the maximum.

2. Plaintiffs, at their sole expense, may photocopy any or all of the said 200 files and any part of any or all of such files, provided they obtain written permission to do so, in advance, from each inmate subject of such files. Before giving permission to photocopy, each such inmate shall receive a written notice from plaintiffs describing, in reasonable detail, the identities and numbers of persons who may have access to the photo-

copies sought by plaintiffs and the plaintiffs' proposed eventual disposition of the photocopies.

3. Plaintiffs' attorneys shall not make any use of said photocopies nor permit inspection thereof, except as necessary for acquittal of their duties of representation in this case.

4. Plaintiffs' attorneys are charged with protecting the confidentiality of the contents of all the files or parts of files inspected and/or copied by them and/or their assistants.

IT IS FURTHER ORDERED that those portions of the record in this proceeding which contain transcripts or partial transcripts of inmate hearings in which the identity of the subject inmate or any other inmate or former inmate is revealed shall be immediately sealed and such portions shall be open for inspection only by further order of this Court. The responsibility for effecting sealing is placed upon counsel for plaintiffs.

Dated: 12/3/74

/s/ Stanley A. Weigel
United States District Court Judge



[Title Page, Topical Index, Table of Cases, Caption Omitted in Printing.]

United States Court of Appeals
for the Ninth Circuit

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No. 74-3392

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[Filed December 13, 1974]

PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION, APPLICATION FOR STAY OF DISCOVERY ORDER AND NOTICE OF RELATED CASE.

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APPLICATION FOR IMMEDIATE STAY
PURSUANT TO RULE 6(g)

Petitioners,[1] defendants in a civil rights action, apply for a writ of mandamus and/or prohibition and for a stay of a discovery order of respondent, the district court, and in support of their application state:

JURISDICTION

The jurisdiction of this Court is founded on Title 28, United States Code section 1651(a).

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[1]Petitioners are the defendants in a civil rights action below, and are Henry W. Kerr, Curtis O. Lynum, Walter A. Gordon, Jr., Manley J. Bowler, James H. Hoover, Charles E. Brown and Daniel R. Lopez, members of the California Adult Authority; Joseph A. Spangler, Administrative Officer of the California Adult Authority; and Raymond K. Procunier, Director of the California Department of Corrections. —

## Questions Presented

1. Whether mandate is proper to correct a clearly erroneous discovery order of the district court?

2. Whether the district court clearly erred under Rules 34 and 26, Federal Rules of Civil Procedure, by ordering petitioners to indiscriminately produce for adversary inspection and copying by the real parties in interest (plaintiffs below), without any preceding *in-camera* inspection, the entire contents of all correctional files, including all confidential documents, of any 200 state prison inmates whose names are to be selected by the real parties in interest?

3. Whether the district court clearly erred under Rules 34 and 26, Federal Rules of Civil Procedure, by ordering the continued recording of all aspects of state parole consideration proceedings, including deliberations by panel members, even though about 1100 such proceedings have already been recorded under an earlier discovery order of the district court in this case?

## Relief Sought

The district court's discovery order of December 3, 1974 (Appendix R) requires the production for inspection and copying of every prison file and document on any 200 inmates designated by plaintiffs. The order also requires the recording of additional hundreds of parole consideration proceedings.

Petitioners request the order be stayed and vacated to the extent it requires production of confidential documents, and to the extent it requires any further recording of parole consideration proceedings.



Petitioners request that, pending disposition of the within petition, the district court's discovery order be stayed to the extent that it requires the production of confidential documents and to the extent it requires the continued recording of parole consideration proceedings.

## Reasons Why the Writ Should Be Issued

The writ should be issued to (a) to protect numerous confidential documents from needless indiscriminate disclosure for adversary inspection and copying, and (b) to terminate the continued compelled recording by plaintiffs below of all aspects of hundreds of parole consideration proceedings.

The district court clearly erred under Rules 34 and 26, Federal Rules of Civil Procedure, by ordering the indiscriminate production for advisory inspection and copying, without any preceding *in-camera* inspection, the entire contents, including all confidential documents, of all files of any 200 state prison inmates, whose names are to be selected and designated by plaintiffs. The district court also clearly erred under Rules 34 and 26, by compelling the continuing recording by plaintiffs of all aspects of state parole consideration proceedings, including deliberations not in the inmate's presence, even though about 1200 such hearings have already been recorded pursuant to an earlier order of the district court.

Review by appeal from judgment entered after trial in this action will be too late to prevent or cure the irreparable harm which will result from displaying

and furnishing copies of the confidential documents. Similarly, review by appeal will be too late to vindicate petitioners' interests in terminating the erroneous and intrusive monitoring of parole consideration proceedings which, for discovery purposes, has become needlessly redundant to the point of harassment.

### Federal Rules, Statutes and Constitutional Provision Involved

This petition involves Rules 26, 34 and 27 of the Federal Rules of Civil Procedure; Title 28, United States Code section 1651; and United States Constitution, Fourth Amendment.

### Notice of Related Case

Proceedings on another petition for writ of mandate to vacate another clearly erroneous discovery order by the respondent court in this case are now pending before this court in *Kerr,* et al, vs. *United States District Court* for the *Northern District of California,* etc., No. 74-2206. That petition was filed June 26, 1974, and seeks review of an earlier discovery order in the action below which compelled the production also without any *in-camera* inspection, of numerous confidential documents such as personnel files of the petitioners, personal correspondence, personal notes, and intra and inter departmental memoranda, etc. This court issued a stay of that discovery order, pending disposition of the petition for writ of mandate, to the extent the order required production of confidential documents. Copies of the stay orders are attached hereto as Appendixes.



The matter was argued before Judges Duniway, Hamley, and Merrill on November 14, 1974 and submitted for decision at that time. The stay is now in force, and was in force at the time the district court issued the discovery order herein sought to be reviewed.

### Statement of Facts

#### A. *Nature of the Case*

Plaintiffs in the action below are state prisoners and by a complaint filed in November 1972, bring this Civil Rights action as a class action on behalf of all adult male felons in California state prisons or on parole. On August 1, 1974 the district court ordered that the action may be maintained as a class action on behalf of the above class. Petitioners, defendants below, are eight members of the California Adult Authority (the state parole board); Joseph Spangler, the Chief Administrative Officer of the Adult Authority; and Raymond K. Procunier, the Director of the California Department of Corrections. A copy of the complaint is attached hereto as Appendix T. A copy of the answer to the complaint is attached hereto as Appendix U.

The complaint demands a declaratory judgment and a mandatory injunction to announce and enforce the following rights at the following proceedings:

(A) ***The Rights Demanded***

1. The right to counsel, appointed if necessary;
2. The right to call favorable witnesses;

3. The right to confront and cross-examine adverse witnesses;
4. The right to discovery of any charges and of the evidence which may be considered with respect to those charges;
5. The right to challenge for bias members of an parole or disciplinary panel;
6. The right to a verbatum record of the proceedings; and
7. The right to a written decision including a statement of the reasons for decision and of the evidence relied on.

(B) *The Complaint Demands Each of the Above Rights at Each of the Following Proceedings:*

1. Parole granting proceedings;
2. Term fixing proceedings:
3. Parole recision proceedings;
4. Parole revocation proceedings;
5. Term re-fixing proceedings;
6. Serious disciplinary proceedings.[2]

[2]Most of the rights demanded in the complaint have been established in independent litigation in other courts. The inmate's rights to counsel, favorable witnesses, confrontation, cross examination, discovery, and to written findings giving the reasons for decision and the evidence relied on at parole recision, parole revocation, term re-fixing, and discipliniary proceedings have been definitively established and require neither this litigation nor extensive discovery for their establishment or vindication. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Wolff v. McDonald*, ..... U.S. ....., ..... Supreme Court Reporter ..... (1974); *Clutchette v. Procunier*, ..... F.2d ....., No. 71-2357, October 21, 1974 (9th Cir. 1974) (disciplinary proceedings); *In re Prewitt*, 8 Cal.3d 470, ..... Cal.Rptr. ..... (1972) (parole recision proceedings). Similarly, the inmate's right to extensive discovery of the contents of their prison files and to written reasons at proceedings on parole granting and term fixing is established in *In re Olson*, 37 Cal.App.3d 783, 112 Cal. Reporter 579 (1974); *In re Sturm*, ..... Cal.3d ....., ..... Cal.Rptr. ..... (1974).

From the above it is apparent there remains "open" questions only with respect to plaintiffs' demanded rights to counsel and to call, confront, or cross examine witnesses at parole granting proceedings, and their demands for a challenge for bias and a verbatim record at all listed proceedings. It is petitioners' position that these demands raise questions of law the resolution of which does not depend on extensive evidentiary development and does not justify the sweep discovery order below or the indiscriminate production of confidential documents.



The action below has been focused by plaintiffs on the process which is due at parole consideration proceedings. Commencement of trial of the action is presently set for March 24, 1975.

(B) *The Proceedings Resulting in the Order Sought to be vacated*

Pursuant to Rule 34, Federal Rules of Civil Procedure, plaintiffs below requested that petitioners produce for inspection the prison file of every twentieth inmate, that all parole consideration proceedings be recorded up to the time of commencement of trial, and that members of the bar be permitted to attend and take notes at parole consideration proceedings on 24 hours notice. Petitioners objected to these requests and plaintiffs moved to compel this discovery. A copy of plaintiff's motion to compel, dated May 12, 1974, is attached hereto as Appendix A. Petitioners filed a written opposition, attached hereto as Appendix B, on several grounds including confidentiality of the inmate files and of the deliberations of panel members, and because of a formally adopted state wide policy state-

ment prohibiting visitors at parole consideration hearings from taking notes at proceedings attended by them. The matter was heard by a magistrate whose "Findings and Recommendations" are attached hereto as Appendix C. The magistrate recommended that no hearings be recorded, that petitioners produce up to 200 files for inspection by plaintiffs below, and that three members of the bar, including counsel for plaintiffs, be permitted to attend and take notes at 15 parole consideration hearings. (Appendix C, pages 5-7).

Petitioners promptly and voluntarily complied with the magistrate's recommendation for attorney's visits and permitted 24 attorneys, including each of plaintiffs' counsel of record, to attend and take notes at 160 parole consideration proceedings.

Petitioners request for review by the district court of the magistrate's recommendation for production of 200 inmate files is attached hereto as Appendix D. Petitioners therein again raised the confidentiality of the contents of such files. Plaintiffs below also requested review of the magistrate's recommendations, but on the grounds that parole consideration proceedings should be recorded, and that the number of files subject to inspection should not be limited to 200. Plaintiffs' request for review is attached hereto as Appendix E. The matter was heard by the district court and on August 12, 1974 the district court issued an order which affirmed in part and overruled in part the magistrate's findings and recommendations. A copy of this order is attached hereto as Appendix F. The district court ordered that all aspects of parole consideration proceedings at San Quentin



State Prison and at the California Medical Facility at Vacaville, including deliberations of panel members out of the presence of inmates, be recorded by plaintiffs provided that the individual inmates consent to such recording, and that the files of up to 200 inmates, whose hearings have been recorded and who consent to inspection, be produced by petitioners for inspection by plaintiffs.

After some 340 parole consideration proceedings had been recorded, petitioners moved for an order terminating further compelled recordings. A copy of this motion is attached hereto as Appendix G. Plaintiffs below filed opposition on the ground that not enough hearings had been recorded. A copy of plaintiffs' opposition is attached hereto as Appendix H. The matter was heard and denied by the district court by order in open court on August 29, 1974.

After an additional 230 proceedings had been recorded at San Quentin, petitioners filed on September 18, 1974 their second motion to terminate the recordings. A copy of this motion is attached hereto as Appendix I. Plaintiffs answer to this motion is attached hereto as Appendix J. Plaintiffs again asserted that not enough proceedings had been recorded. On October 15, 1974, petitioners filed a supplemental memorandum in support of their motion to terminate the recordings. This memorandum reported to the court that another 133 proceedings had been recorded at Vacaville the first week of October 1974. This made a total of approximately 670 proceedings which had been recorded. A copy of this supplemental memorandum is attached hereto as Appendix K. The motion

was heard and denied by oral order of the district court on October 17, 1974.

In the meantime, plaintiffs below, by letter dated September 27, 1974, served their first list of 28 inmates whose files they wish to inspect. A copy of this request is attached hereto as Appendix V. Petitioners responded by furnishing the files of 22 of the listed inmates who had consented to recordation and inspection. In doing so prison personnel, as a preliminary matter, withheld from the files certain confidential documents such as crime partner information, Youth Authority records, sensitive clinical data, investigative reports accompanying visitor requests, etc. Each such document withheld was identified in writing as was the reason for withholding it, and plaintiffs' counsel was furnished the writing. Attached as Appendix W is memorandum with exhibits which describe counsel's inspection of the files and identify the documents preliminarily withheld from such inspection.

On August 15, 1974, and again on September 18, 1974, this court stayed a discovery order of the district court in this case which compelled the petitioners to produce confidential documents for adversary inspection without any preceeding in camera inspection. *Kerr v. United States District Court,* No. 74-2206. Copies of these stays are attached hereto as Appendix S.

By letter dated October 15, 1974 counsel for petitioners advised counsel for plaintiffs that if they wished to inspect any of the confidential documents



withheld they should express some specific need for them in this action whereupon the confidentiality would be re-evaluated in light of such need. A copy of this letter is attached hereto as Appendix X. This procedure, which foresaw negotiations between counsel and then, if necessary, presentation of the documents to the district court for an *in-camera* inspection and balancing of the interests in confidentiality against plaintiffs' need for the documents in this action, was unsatisfactory to plaintiffs who brought the matter directly to the attention of the district court by way of formal motion.

Plaintiffs filed on October 19, 1974 their "Motion for Enforcement, Clarification, and Sanctions," a copy of which is attached hereto as Appendix L. This motion requested that the inmate files be furnished intact, including all confidential documents; that plaintiffs be allowed to make photocopies of any and all of the contents of these files; and that the files to be inspected not be limited to inmates whose parole consideration proceedings had been recorded.[3] Petitioner filed a response in opposition to this motion and a cross-motion to terminate the recordings. By this time about 900 parole consideration proceedings had been recorded. A copy of this opposition and cross-motion is attached hereto as Appendix M. Plaintiffs below

[3] The reasons for this limitation, discussed and agreed upon in open court prior to the order of August 12, 1974 (Appendix F), was that plaintiffs' action had focused on the process due at parole consideration proceedings, and that it was most logical to examine the files used at the particular proceedings which were also recorded.

filed a response to petitioner's opposition, Appendix N herein, and petitioners filed a reply to that response, attached hereto as Appendix O.

The matter was heard by the district court on October 31, 1974 whereupon the court announced orally that (1) the inmate files subject to inspection includes the files of inmates who parole consideration proceedings were not recorded; (2) the contents of the files to be produced for inspection must include all confidential material; (3) plaintiffs could move for a modification of district court's order of August 12, 1974 to permit photocopying, and (4) that plaintiff's counsel could have the assistance of two certified law students in inspecting the files. The district court again denied petitioner's motion to terminate the recordings. The district court stated that a written order would be forthcoming.

Plaintiffs below then filed a motion for modification of the August 12, 1974 order (Appendix F herein) to permit photocopying of the contents of the inmate files. This motion is attached hereto as Appendix P. Petitioners filed opposition to this as well as another cross motion to terminate the recordings. This opposition and cross motion is attached hereto as Appendix Q. By this time (the period of November 18-27, 1974) between 1150 and 1200 parole consideration proceedings would have been recorded.

The matter was heard on November 21, 1974 whereupon the district court dictated in open court the order to which this petition is addressed. The full



text of the court's order, signed December 3, 1974, is attached hereto as Appendix R.

C. *Provisions of the discovery order (Appendix R) which petitioners request be stayed and vacated*

The order of December 3, 1974 incorporated by reference the order of August 12, 1974; requires the production for inspection and copying of every prison file and document on any 200 inmates designated by plaintiffs; and requires the recording of additional hundreds of parole consideration proceedings. Petitioners request the order by stayed and vacated to the extent it requires production of confidential documents, and to the extent it requires any further recording of parole consideration hearings.

1. *The Order's Provisions for Inspection:*

"IT IS HEREBY ORDERED that the central files made available to plaintiffs in accordance with the order dated August 12, 1974, shall include any and all material, wherever located, which is available to or could be available upon request to Adult Authority members or hearing representatives in making parole determinations. The term 'central files' shall include all files of a prisoner in the California Prison System, however designated, including but not limited to, 'investigative files', 'administrative files', or any similar designations. All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection.

"IT IS FURTHERED ORDER that all material previously removed or withheld by defendants from files already requested by plaintiffs shall be made available to plaintiffs' counsel for inspection within 10 days.

* * *

"IT IS FURTHERED ORDER in reference to the order of this court dated August 12, 1974, that: 1. Defendants shall make available to plaintiffs, upon plaintiffs' request, the central file of any inmate within California Prison System, whether or not hearings have been tape-recorded for such inmate, up to a maximum of 200 such files. Files previously make available shall be counted toward the maximum." (Appendix R, pages 1:22-2:7; page 3:1-6).

2. *The Order's Provision for Photocopying:*

"Plaintiffs, at their sole expense, may photocopy any or all of the said 200 files or any part of any or all such files, provided they obtain written permission to do so, in advance, from each inmate subject of such files. Before giving permission to photocopying, each such inmate shall receive a written notice from plaintiffs describing, in reasonable detail, the identities and numbers of persons who may have access to the photocopies sought by plaintiffs and the plaintiffs' proposed eventual disposition of the photocopies.

"Plaintiffs' attorneys shall not make any use of said photocopies or permit inspection thereof, except as necessary for acquittal of their duties of representation in this case.

"Plaintiffs' attorneys are charged with protecting the confidentiality of the contents of all



files or parts of files inspected and/or copied by them and/or their assistants." (Appendix R, page 3:7-24).

3. *The Order's Provision for Additional Recordings:*

"IT IS FURTHER ORDERED that the tape recordings of parole consideration hearings provided for by the Order of this Court dated August 12, 1974, continue unobstructed, and that such recordings include any and all utterances of hearing officers or other prison officials present before, during and after the time the inmate enters the hearing room." (Appendix R, page 2:25-30).

By including in its order "any and all material, wherever located, which is available to or *could be available* upon request to Adult Authority members or hearing representatives in making parole determinations. . .",[4] the district court's order guarantees that highly confidential documents which are indisputably irrelevant to the claims in the action below must be indiscriminately produced for inspection and copying. Petitioners have difficulty conceiving of any clearer abuse of judicial discretion, of any clearer disregard of personal safety and privacy, and of institutional security.

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[4]Appendix R, page 1:24-27 (emphasis added).

## Argument

### I

### Mandamus In An Appropriate Remedy for Reviewing A Discovery Order Which Is Clearly Erroneous or Amounts To A Clear Abuse of Discretion.

Issuance of a writ of mandate under 28 U.S.C. sections 1651(a) is an appropriate exercise of the powers of a Court of Appeals to vacate a clearly erroneous discovery order by a district court. *United States Board of Parole v. Merhige,* 487 F.2d 25, 29-30 (4th Cir. 1973), *cert. denied sub nom; Merhige v. United States Board of Parole,* No. 73-1105, 42 U.S.L.W. 3653 (May 28, 1974); *Harris v. Nelson,* 394 U.S. 286 (1969); *Harley Pen Company v. United States District Court, etc.,* 287 F.2d 324 (9th Cir. 1961). See, Note, *Supervisory and Advisory Mandamus Under the All Writs Act,* 86 Harvard Law Review 595 (1973).

### II

### The Discovery Order Is Clearly Erroneous Insofar As It Requires Production of Confidential Documents Without A Prior In-Camera Determination.

The discovery order is clearly erroneous and a clear abuse of judicial discretion because:

(1) It requires the production of confidential documents for inpection and copying;

(2) This requirement in indiscriminate;



(3) The order makes no provision for some prior determination by the court of whether the interests of defendants and of the public in maintaining confidentiality outweighs plaintiffs' need for particular documents in this action;

(4) The order precludes any opportunity for such a determination.

#### A. *The Order Requires the Production of Confidential Documents.*

The district court's discovery order requires that defendants produce for plaintiffs' inspection and copying the entire contents of the prison files of any 200 inmates in the California Correctional System who may be designated by plaintiffs. The order defines the contents of such files to include every document which members of the Adult Authority *could* inspect in considering whether to grant an inmate parole.

We do not know which 200 inmates will be designated by plaintiffs, and therefore there is no way of knowing the particular confidential documents which defendants will be required to produce under the order. However, an example of some of the kinds of documents covered by the order can be discerned from the record. Pursuant to the court's order of August 12, 1974 (Appendix F) plaintiffs have already requested the production of the files of 28 inmates (Appendix V). The contents of these files included numerous confidential documents which are designated

in Appendix W attached hereto. Such documents include:

(1) Clinical evaluations respecting sensitive medical and of psychitric treatment;

(2) Records of the Youth Authority;

(3) Documents expressing fear;

(4) Rap sheets on persons other than the inmate whose files is produced;

(5) Incidents reports, the disclosure of which would endanger the life of other persons;

(6) Correctional cumulative case summaries of persons other than the inmate whose file is produced;

(7) Investigative reports accompanying certain visitor requests;

(8) Crime partner information;

(9) Letters from judges, district attorneys, and other outsiders;

(10) Memoranda from the attorney general;

(11) Information on informants against the inmate the disclosure of which would jeopardize the safety of the informant.

Such documents are confidential for recognized sound reasons of public policy, or under state statutes, *e.g.*, California Penal Code sections 3046, 1203.01, 3022, 3044, 11105(b), 11120, 11122-11125.



B. *The Order's Requirement for Production of Confidential Documents is Indiscriminate:*

The district court's order requires the production of the entire correctional files, as well as documents not in the files but accessible to the Adult Authority, of any 200 inmates in the entire Correctional System. We do not know at this point which 200 inmates will be designated by plaintiffs and there is no restriction on who may be designated by them. We do not know therefore what particular confidential documents will be required to be produced. In petitioner's view these circumstances virtually assure that highly confidential documents of no possible use to the plaintiffs in the action below will have to be disclosed for plaintiffs' inspection and copying.

Rather than exercising judicial discretion with respect to particular confidential documents, the district court has issued a blanket order requiring the production of everything and then leaving to counsel for plaintiff the responsibility for not unnecessarily violating the confidentiality of the documents:

> "Plaintiffs' attorneys will not make any use of said photocopies nor permit inspection thereof, except as necessary for acquittal of their duties of representation in this case.
>
> "Plaintiffs' attorneys are charged with protecting the confidentiality of the contents of all the files or parts of files inspected and/or copied by them and/or their assistants." (Court's Order of December 3, 1974, Appendix R page 3:17-24).

With all due respect to opposing counsel as officers of the court and as honorable persons, petitioners submit that the expected self-restraint of vigorous advocates and their assistants is no substitution for an exercise of the sound discretion of an objective jurist. These protective provisions of the district court's order should apply to any confidential documents required to be disclosed following some determination by the court that plaintiffs' need for the documents in this action outweighs their confidentiality. However, the protection which may be afforded the confidentiality of the documents by the responsibility cast on plaintiffs' counsel is not sufficient to support the indiscriminate sweeping scope of the court's order.

Petitioners tried to take reasonable steps to protect the confidential documents from needless disclosure. This was done by withholding only the confidential items, as a preliminary matter, and offering to re-evaluate their confidentiality in light of some particularized expression of plaintiffs' need for them in this action. The documents still not disclosed after these negotiations would be submitted to the court for a determination of whether plaintiffs' need of them outweighed their confidentiality. These steps were proposed in a letter to counsel. (Appendix X herein). The immediate response of counsel for plaintiffs was to reject this invitation and to make their formal motion to the court for enforcement, clarification, and sanctions (Appendix L). Plaintiffs' counsel have thus expressed their view that every documents was "necessary" for acquittal of their duties of representation in this case.



C. *The Discovery Order Makes No Provision For any Prior In-Camera Determination:*

Although petitioners had repeatedly called below for an *in-camera* inspection prior to the compelled disclosure of confidential documents,[5] the court's orders of August 12, 1974 and December 3, 1974 make no provision for such inspection. Indeed, during the appearance of respective counsel in the district court on October 31, 1974 the district court indicated that the procedure followed by petitioners, described in petitioner's letter to plaintiffs' counsel (Appendix X), amounted to a violation bordering on contempt of the district court's order of August 12, 1974.

Therefore, neither discovery order of August 12, 1974, nor the discovery order of December 3, 1974 make any provision for some prior determination by the court of whether the interests of the defendants and of the public in maintaining confidentiality outweighs plaintiffs' need for particular documents in this action.

D. *The Discovery Order Precludes any Opportunity For such a Determination:*

Except for this petition, there is no longer any opportunity for petitioners to take steps to attempt to preserve from needless indiscriminate impairment the confidentiality of certain documents in correctional

[5]Appendix B, page 11; Appendix D, page 6; Appendix X.

files. Petitioners' attempt in October to negotiate with opposing counsel the necessity for disclosure of particular documents was summarily rejected by counsel. The district court indicated clearly that any further such attempts by petitioners would be punishable by contempt proceedings. The court's order of December 3, 1974 underscores the district court's intent by use of the language that "all such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (Appendix R, pages 1:30-2:3).

E. *The Federal Courts Recognize the Propriety of an In-Camera Inspection and Determination Prior to the Compelled Disclosure of Confidential Documents.*

Numerous federal cases have recognized that the compelled disclosure during discovery of confidential documents should be preceded by an *in-camera* inspection of them to determine whether their confidentiality outweighs the need of the proponent of the discovery for the documents in the action before the court. *United States v. Nixon,* ___ U.S. ___, ___ S.Ct. Rptr. ___ (1974); *Jabarra v. Kelly,* 62 F.R.D. 424 (E.D. Mich. 1974); *Holmes v. Gardler,* 62 F.R.D. 70 (E.D. Pa. 1974); *Gaison v. Scott,* 59 F.R.D. 347 (E.D. Ha. 1973); *Frankenhauser v. Rizzo,* 59 F.R.D. 339 (E.D. Pa. 1973).



The federal courts have also recognized as proper the denial of discovery of confidential documents which are not needed by the proponent of the discovery for the action before the court. *United States Board of Parole v. Merhige, supra,* 487 F.2d 25 (4th Cir. 1973), *cert. denied sub nom; Merhige v. United States Board of Parole,* ___ U.S. ___, ___ S. Ct. Rptr. ___ (1974); *Harley v. Pen Company v. United States District Court, etc.,* 287 F.2d 324 (9th Cir. 1961).

## III

## An In-Camera Inspection Prodecure Will Not and Cannot Impair The Integrity of The Fact-Finding Process or of The Federal Discovery Rules.

The procedure called for below, and requested in this petition, cannot impair any search for the truth at trial below and cannot impair the integrity of the federal discovery rules. Petitioners ask only that highly confidential documents not be compelled or disclosed needlessly under circumstances where they will be of no use to the plaintiffs' prosecution of their action in the district court. Petitioners' request only leave to withhold as a preliminary matter documents deemed by them to be confidential, that there be an opportunity for petitioners to knowledgeably evaluate the degree of confidentiality of the documents in the light of plaintiffs' expression of need for the documents in the action below. All of this would occur in good faith and without the necessity of direct intervention by the district court. This would also serve to

insulate the district court from the burden of conducting unnecessary *in-camera* stop inspection and determination. This procedure would assure that plaintiffs are denied only those documents whose confidentiality outweighs plaintiffs' need for the documents in this case. To compel the disclosure for inspection and copying of confidential documents not needed by the plaintiffs in this action would serve no legitimate interest of plaintiffs below and would in no way enforce the intent or preserve the integrity of the federal discovery rules.

## IV

## The Discovery Order Is Clearly Erroneous Insofar As It Requires The Continued Recordation of Parole Consideration Proceedings.

The action below has focused on the process which may be due at state parole consideration proceedings. Plaintiffs have been furnished massive discovery of all prospects of these proceedings, and there is no justification for the continuing compelled recording of all aspects of the parole consideration proceedings.

Guidelines for determining whether and if so what process may be due at particular proceedings are set forth in *Morrissey v. Brewer,* 408 U.S. 471 (1972). In that opinion, the high court stated:

> "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer a grievous loss' . . . .
>
> "Consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental functions involved as well as the private interest that has been effected by governmental action." 408 U.S. at 481.



The discovery already furnished plaintiffs below includes the following:

(1) Depositions have been taken by plaintiffs of many of the persons who sit as panel members at parole consideration proceedings. The members of the Adult Authority have been deposed (nine depositions), as have been three hearing representatives. Each such deposition focused on two areas: (a) the biographical date concerning the person being deposed; and (b) an extensive inquiry into the nature and function of parole consideration proceedings.

(2) Plaintiffs took the depositions of the chief statistician in the Department of Corrections, and of the chief of research for the department.

(3) Plaintiffs have taken the deposition of a prison psychiatrist with respect to all aspects of his employment with the Department of Corrections, including the manner in which inmates are interviewed and evaluated by psychiatrists for purposes of furnishing the Adult Authority information to be considered in determining whether to grant a particular inmate parole.

(4) A Department of Corrections' correctional counselor was deposed at length by plaintiffs and this deposition included an extensive inquiry into the nature of his duties, the nature of his relationship with inmates, and the nature of his obtaining and

reporting information to the Adult Authority for consideration at parole proceedings.

(5) Attorneys visits; 24 attorneys, each of whom were designated by plaintiffs, attended and took notes at 160 different parole consideration proceedings. These notes were retained by the attorneys and are available for plaintiffs' inspection.

(6) Visits by lay persons: Many dozens of lay persons designated by plaintiffs have attended parole consideration proceedings. These are the persons who have been operating plaintiffs' recording machines to record the parole consideration proceedings pursuant to the court's order of August 12, 1974. These persons have attended well over 1,100 parole consideration hearings.

(7) Recordings: Pursuant to the court's order of August 12, 1974, plaintiffs have recorded over 1,100 parole consideration proceedings. Plaintiffs have custody and unrestricted access to the tapes.

(8) Inspection of files: Pursuant to the court's discovery orders, plaintiffs have access for inspection and copying of the files of 200 inmates.

From all of the above numerous sources of information plaintiffs have actually been afforded massive discovery of the function and nature of California state parole consideration proceedings.

The further compelled recordation of all aspects of the parole consideration proceedings will not significantly advance plaintiffs' interest in full discovery of the nature and function of these proceedings, and



will serve to continue to be intrusive and harassing to defendants. This particular discovery has been permitted to extend beyond any colorable need for the information obtained and is needlessly redundant.

Petitioners' objections to the continued compelled recording of parole consideration proceedings have been rejected by the district court. Petitioners' motion to terminate these recordings appear in Appendices G, I, K, M, Q.

For the reasons set forth in the appendices, petitioners urge that the compelled recordation should be terminated also because they suspend operation of Adult Authority policy statement No. 3 (Appendix B, Exhibit H), a formally adopted Adult Authority policy of statewide application, the enjoining of which may only be accomplished by a three-judge court convened pursuant to Title 28, United States Code, sections 2281 and 2284. The order improperly compels recordation of deliberations of panel members out of the presence of the inmates whose parole is being considered. Panel embers should have the opportunity to make these deliberations, and exchanges of comments between the, with candor and in confidentiality.

## V

PURSUANT TO RULE 6(g), RULES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT PETITIONERS REQUEST AN IMMEDIATE STAY OF THE DISTRICT COURT'S DISCOVERY ORDER INSOFAR AS IT COMPELS DISCLOSURE OF CONFIDENTIAL DOCUMENTS IN INMATE FILES, AND INSOFAR AS IT COMPELS THE CONTINUED RECORDING OF ADULT AUTHORITY PROCEEDINGS.

The District Court's discovery order of December 3, 1974 provides:

> "IT IS FURTHER ORDERED that all material previously removed or withheld by defendants from files already requested by plaintiffs shall be made available to plaintiffs' counsel for inspection within 10 days." (Appendix R page 2 lines 4-7).

The confidentiality of these documents is indicated in the attachments in Appendix W wherein each of documents withheld is identified as are the reasons for withholding it. The 10-day period mentioned in the District Court's order will expire on Friday, December 13, 1974. Accordingly, in the absence of an immediate stay petitioners will have to disclose each of these confidential documents for inspection by plaintiffs.

This would result in irreparable harm as the disclosure of the documents, once accomplished, would permanently impair their present confidentiality. The necessity for an immediate stay is stated in paragraphs 7, 8, 9, and 10 of the affidavit of Karl S. Mayer attached as Exhibit A.



Petitioners expect that plaintiffs will soon serve requests for production for inspection and copying of numerous additional inmate files. Under the district court's discovery order of December 3, 1974, petitioners will have to immediately produce all of the contents of all files as well as all documents relating to the specified inmates to which the Adult Authority or its hearing representatives could gain access upon request. The production of such documents will cause further irreparable harm and will further impair the interests sought to be advanced in this petition.

As is more fully set forth at length in the Certificate of Counsel of Karl S. Mayer, attached as Exhibit A, petitioners did not obtain a stay from the district court of its order of December 3, 1974. The reasons this was not done include the following:

(1) The district court's order requires the indiscriminate production of highly confidential documents, with no provision for any prior *in-camera* determination, even though there was no outstanding stay issued by this Court of an earlier discovery order of the district court in this action insofar as that earlier order compelled the production of confidential documents requested in a separate Rule 34 request for documents. This outstanding stay was issued in *Kerr v. United States District Court, etc.*, No. 74-2206, and is attached hereto as Appendix S.

(2) Petitioners regarded any request of the district court for a stay of its own order pending disposition of petition for mandate as an exercise in futility. Such a stay was summarily denied by the

court with respect to its earlier order, which compelled the disclosure of numerous confidential documents including the personnel files of each member of the Adult Authority and of each hearing representative.

A stay of the order for production of confidential documents in inmate files will not materially impair plaintiffs' preparation for trial. Trial in this action is presently scheduled to commence on March 24, 1975 so that there is ample time for disposition of this petition before trial. Plaintiffs will be furnished all other documents in the files requested. Plaintiffs will eventually be denied only those documents whose confidentiality outweighs plaintiffs' need for them in the action below.

Petitioners also request that the district court's discovery order be immediately stayed pending disposition of the within petition insofar as it compels the continued recording of Adult Authority parole consideration proceedings. As has been indicated above, over 1,100 such proceedings have already been recorded in their entirety. These recordings furnish plaintiffs a massive supply of information with respect to the nature and function of the proceedings. The immediate discontinuance of these recordings will not result in any significant prejudice to plaintiffs. Some 260 additional parole consideration proceedings are presently scheduled to occur at San Quentin the period of December 16 through 20, 1974.

The district court's order of August 12, 1974 (Appendix F attached to the within petition) required recordation only of "deliberations and conversations



between and among panel members relating to the hearing . . . ." (Exhibit F page 2 lines 21-24). The district court's order of December 3, 1974 significantly expands the compelled recordation in that it is not limited to conversations or deliberations relating to the hearings, nor is it limited to hearing officers of panel members. The order of December 3, 1974 requires recordation of all utterances and applies nor only to hearing officers but also to any other prison official in the room (Appendix R, page 2 lines 27-30). Accordingly, the district court's discovery order of December 3, 1974 needlessly and indiscriminately requires the recordation of confidential communications as well as personal communications of no relevance whatsoever to the action below. Absent an immediate stay from this Court, the district court's order will significantly and unnecessarily intrude upon confidential communications beginning December 16, 1974.

Petitioners did not apply to the district court for a stay of this part of the order because to have done so would have been futile. The court's order is the fourth denial of petitioners' request to terminate the recordings. An application for stay would have amounted to a fifth such request made at the same time the fourth request was denied.

## Conclusion

For all of the above reasons, petitioners respectfully request that this petition for a writ of mandamus be granted to vacate the district court's discovery order of December 3, 1974 to the extent that it requires

disclosure of confidential documents without any prior *in-camera* determination that their confidentiality is outweighed by plaintiffs' need for the documents in the action below, and to the extent that the order compels the continued recording of Adult Authority parole consideration proceedings.

Also for the foregoing reasons, petitioners respectfully request that this court grant an immedate stay of the provisions of the district court's discovery order which require the disclosure of confidential documents and which require the continued compelled recording of parole consideration proceedings. Petitioners respectfully request that this stay continue pending disposition of the within petition.

Dated: December 13, 1974

EVELLE J. YOUNGER,
Attorney General
of the State of California

JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division

EDWARD P. O'BRIEN
Assistant Attorney General

JOHN T. MURPHY
Deputy Attorney General

/s/ Karl S Mayer

KARL S. MAYER
Deputy Attorney General
Attorneys for Petitioners.



[EXHIBIT A]

AFFIDAVIT OF COUNSEL

KARL S. MAYER, being first duly sworn, deposes and says:

1. I am an attorney at law duly licensed to practice before this court and I am deputy attorney general of the State of California assigned by my superiors to represent the defendants in *Van Geldern et. al. v. Kerr, et. al.,* No. C-72-2088SAW, USDC, N.D. Cal., and petitioners in the within petition. I am also counsel for petitioners in *Kerr v. United States District Court,* No. 74-206, United States Court of Appeals for the Ninth Circuit.

2. The petition for writ of mandamus in *Kerr v. United States District Court,* No. 74-2206, in the files of this court, is addressed to a discovery order rendered by the same court in the same action as is the discovery order sought to be reviewed in the within petition for mandamus. The discovery order in that earlier and pending petition for writ of mandamus compelled the disclosure of documents, including the personnel files of petitioners and of hearing representatives of the California Adult Authority, without provisions for any *in-camera* inpsection prior to such disclosure. This court issued a stay of that earlier discovery order to the extent that it requires the production of documents objected to by petitioners as confidential. This stay is attached to the within petition as Appendix S.

3. This court's stay in No. 74-2206 was outstanding at the time the district court issued the discovery order herein sought to be reviewed compelling the production of other highly confidential documents without any *in-camera* inspection.

4. In action No. 74-2206 petitioners are requesting that the production of confidential documents not be compelled without a prior *in-camera* determination that plaintiffs' need for them outweighs such confidentiality. The same relief is sought in the within petition.

5. Petitioners had requested that the discovery order now being reviewed in action No. 74-2206 be stayed pending such review and this request was denied by the district court.

6. As counsel for petitioners it was and is my view that it would be an exercise in futility to request the district court to stay its own discovery order of December 3, 1974 in view of the circumstance that the same court in the same action had refused to stay its earlier discovery order also requiring the production of confidential documents without any prior *in-camera* inspection. It was and is also my view that the futility of such a request is underscored by the circumstance that the present discovery order of December 3, 1974 was issued despite the existance of this court's outstanding stay of similar provisions of the district court's earlier discovery order in this case.

7. The district court's order of December 3, 1974 requires petitioners to produce within 10 days (by



December 13, 1974) confidential documents for plaintiffs inspection and copying.

8. The confidential nature of the documents to be produced by December 13, 1974 is described in the exhibits attached to Appendix W of the within petition. The grounds for asserting confidentiality include statutory confidentiality under California state law (California Penal Code sections 3046, 1203.01, 3022, 3044, 11105(b), 11120, 11122-11125; and strong interests in public policy in maintaining confidentiality in documents which include statements from outsiders made with candor in the belief they would remain confidential, and statements from informers and persons from within the institutions the disclosure which would jeopardize their personal safety and/or institutional security.

9. Unless the district court's discovery order is stayed insofar as it requires disclosure of such confidential documents for inspection, their confidentiality will be irreparably impaired. In particular instances, institutional security and personal safety will also be jeopardized.

10. The immediate disclosure of these documents for plaintiffs' inspection is not essential to their preparation of the case for trial below, and the nature of the relief sought in the within petition is such that plaintiffs will be denied access only to documents whose confidentiality outweighs plaintiffs' need for them in the action below.

11. It is my understanding that plaintiffs have recorded in their entirety over 1100 Adult Authority

parole consideration proceedings pursuant to the district court's order of August 12, 1974. The massive discovery afforded plaintiffs with respect to the nature and function of parole consideration proceedings includes these recordings as well as numerous depositions of persons who sit as panel members at such proceedings, information available from inspection of documents in the files of up to 200 state prison inmates, and information from numerous persons, including dozens of lay persons and 24 attorneys all designated by plaintiffs, who have attended and taken notes at many hundreds of parole consideration proceedings.

12. Unless this court grants an immediate stay of the district court's order an additional 263 parole consideration hearings, beginning December 16, 1974, will have to be recorded pursuant to the court's order. The intrusions resulting from this compelled recording are significant and will continue with respect not only to the proceedings calendared for December 1974, but also the hundreds of parole consideration proceedings which will be scheduled for the months of January, February and March 1975 up to the time of commencement of trial.

13. Petitioners neither obtained nor requested from the district court a stay of this part of its order pending disposition of the within petition. As counsel for petitioners it was and is my belief that a request for such a stay would have been an exercise in futility. This belief is based on the circumstance that the district court had rejected each of petition-



er's four requests for an order terminating these recordings. These requests for termination appear in Appendices G, I, K, M, and Q attached to the within petition. An application for stay would have amounted the fifth such request and would have been made at the same time as denial of the fourth request.

14. As the district court's order requires recordation of "any and all utterances of hearing officers or other prison officials present before, during and after the time the inmates enters the hearing room," the order necessarily intrudes upon what otherwise would be confidential and frank exchanges between panel members, as well as upon confidential and personal conversations amoung hearing officers and prison officials.

15. The district court's order of August 12, 1974 (Appendix F attached to the within petition) required recordation only of "deliberations and conversations between and amoung panel members relating to the hearing . . ." (Exhibit F page 2 lines 21-24). The district court's order of December 3, 1974 significantly expands the compelled recordation in that it is not limited to conversations or deliberations relating to the hearings, nor is it limited to hearing officers or panel members. The order of December 3, 1974 requires recordation of all utterances and applies not only to hearing officers but also to any other prison official in the room (Appendix R, page 2 lines 27-30). Accordingly, the district court's discovery order of December 3, 1974 needlessly and indiscriminately requires the recordation of confiden-

tial communications as well as personal communcations of no relevance whatsoever to the action below. Absent an immediate stay from this court, the district court's order will significantly and unnecessarily intrude upon confidential communications begining December 16, 1974.

Dated: December 13, 1974

/s/ Karl S Mayer
Karl S. Mayer
Deputy Attorney General

KSM:pc

[Jurat Omitted in Printing]



## Appendicies

The text of the appendicies A through X appear elsewhere in this appendix, or are omitted in printing, as follows:

A.—Plaintiffs' Memorandum in support of motion to compel, filed in the district court on May 15, 1974, printed at pages 232-246 above.

B.—Defendants' Response in opposition to plaintiffs' motion to compel, filed in the district court on June 3, 1974, printed at pages 247-260 above.

C.—Magistrate's Findings and Recommendations, filed in the district court on June 11, 1974, printed in the Petition For Writ of Certiorari, appendix, pages xxxiv-xlii.

D.—Defendants' Request For Review of Magistrate's Findings And Recommendations, filed in the district court on June 24, 1974, printed at pages 287-293 above.

E.—Defendants' Notice Of Intent To Seek Review Of Magistrate's Decision And Statement of Objections, filed in the district court on June 17, 1974, printed at pages 273-275 above.

F.—Order of district court filed August 12, 1974 printed in the Petition For Writ of Certiorari, appendix, pages xxix-xxxiii.

G, H, I, J, K.—Omitted in printing this appendix.

L.—Plaintiffs' Notice Of Motion And Motion For Enforcement, Clarification And Sanctions, filed in the

district court on October 21, 1974, printed at pages 446-469 above.

M.—Defendants Opposition To Plaintiffs' Motion For Enforcement, Clarification, And Sanctions, filed in the district court on October 24, 1974, printed at pages 470-541 above.

N.—Plaintiffs' Response To Defendants' Opposition To Plaintiffs' Motion For Enforcement, Clarification And Sanctions, filed in the district court on October 29, 1974, printed at pages 542-560 above.

O.—Defendants' Reply To Plaintiffs' Response To Defendants' Opposition To Plaintiffs' Motion For Enforcement Clarification And Sanctions, filed in the district court on October 31, 1974, printed at pages 561-568 above.

P.—Plaintiffs' Notice Of Motion And Motion For Modification, filed in the district court on November 11, 1974, printed at pages 569-589 above.

Q.—Defendants' Response To Plaintiffs' Motion For Modification, filed in the district court on November 20, 1974, printed at pages 590-646 above.

R.—Order of the district court filed December 3, 1974, printed in the Petition For Writ Of Certiorari, appendix, pages xxv-xxviii, and printed in this appendix at pages 647-650 above.

S.—Order of the Court of Appeals filed September 20, 1974, printed at pages 445 above.

T.—Plaintiffs' Complaint filed in the district court on November 15, 1972, printed at pages 8-50 above.



U.—Defendants' Answer To Complaint As Amended, filed in the district court on July 23, 1974, printed at pages 334-362 above.

V.—Plaintiffs' first designation of inmate files to be inspected, letter dated September 27, 1974 with attachment, printed at pages 529-531 above.

W.—Department of Corrections records of inmate files inspected and of material withheld from inspection, printed at pages 497-524 above.

X.—Letter from Karl S. Mayer to Sidney M. Wolinsky, dated October 15, 1975, printed at pages 525-528 above.

Youth Law Center
693 Mission St., 2nd Fl.
San Francisco, California 94105
(415) 495-6420

December 16, 1974

HAND DELIVERED

Clerk, United States Court of Appeals
for the Ninth Circuit
United States Courthouse and Post Office Building
Seventh and Mission Streets
San Francisco, California 94101

Dear Sir:

Re: Kerr v. United States District Court
No. 74-3392

On Friday, December 13, 1974, a petition for a writ of mandamus, an application for a stay, and an application for an immediate stay pursuant to Rule 6(g) was filed in this Court in the above-captioned case. On the same date, this Court, through Judge Duniway, granted an immediate stay of the underlying orders of the District Court, dated August 12, 1974 and December 3, 1974. The immediate effect of that stay was to cancel the tape recordings of the Adult Authority Hearings at San Quentin, which will now proceed unrecorded throughout this present week, and to prohibit plaintiffs from inspecting inmates' central files to develop information crucial to their case.

1. Rule 8, F. R. App. Pro. requires that a motion for a stay must ordinarily be made in the first instance in the District Court. Petitioners' counsel, in his affidavit, admits that he did not move the District Court to stay either of the two orders which are challenged by the underlying petition for a writ of mandamus in this Court, since it was his "belief" that a request for such a stay "would have been an exercise in futility." However, such a belief is ordinarily an insufficent basis upon which to bypass the District Court. Moreover, petitioners' last motion to terminate the tape recordings was denied by the District Court on October 17, 1974 (oral order). Thus, it appears that petitioners preferred to wait until the very last minute to seek a stay in this Court where such a request would be unencumbered by the weight which appellate courts ordinarily give to denials of stays by the District Court. See, e.g., *Magnum Import Co. v. Coty*, 262 U.S. 159, 163-64 (1924); *Breswick & Co. v. United States*, 75 S. Ct. 912 (1955).

2. Rule 27(a) F. R. App. Pro. provides that a party may file a response in opposition to a motion within seven days after service of the motion. Although the Rule authorizes stay motions made pursuant to Rule 8 to be acted upon within a shorter period of time, it also provides that they may be acted upon only "after reasonable notice * * *." It is obvious from the form and content of the almost three-inch-high set of mandamus/stay documents submitted by petitioners that they were planning to seek this stay for at least many days prior to their filing on Friday afternoon. Yet they declined to inform petitioners until approximately two hours before their papers were filed, when they simply delivered a copy

of these papers to the office of one of plaintiffs' counsel, Sidney M. Wolinsky, who was not present in the office. Indeed, petitioners' counsel engaged in a cordial conversation on this case with Mr. Wolinsky on the 13th, without ever mentioning the imminent filing.

3. Most of the arguments raised by petitioners in support of keeping certain documents in inmates' files from the attorneys here representing the class of inmates was raised and argued by this same law firm (the Attorney General's Office) in *Wright v. Procunier,* No. C-73-1422 SAW (N.D. Cal.), another prison case before the same Trial Judge. When the District Court granted the discovery requested, the prison officials filed a petition for a writ of mandamus which is similar to the one filed in this matter on December 13th. This Court denied that petition on November 18, 1974 (see *Procunier v. District Court,* No. 74-2510). However, petitioners in this case do not allude to the decision of this Court in *Procunier.*

4. Petitioners' action here is both dilatory and has failed to either technically comply with the rules below or, on a practical basis, give the District Court a fair opportunity to assess their arguments. The order allowing inspection of inmate central files (up to a limited number of 200 out of the over 20,000 such files in existence and under carefully controlled conditions) was issued by the Court on August 12, 1974. Thereafter, and in violation of the clear terms of the Court's order, the petitioners took it upon themselves to remove material from the inmates' files prior to inspection by plaintiffs. This necessitated a motion



for enforcement by plaintiffs (Appendix L to Petition). In their opposing papers to plaintiffs' motion (Appendix M to the Petition) petitioners make no mention whatsoever to the Court of the arguments which they now make concerning *in camera* inspection. In short, four months after the Order of the District Court allowing limited inspection of the inmates' central files, defendants now seek review from this Court without even having proceeded properly below.

5. Similarly, defendants' arguments to terminate the recordation of parole consideration hearings also bypass appropriate procedures. Defendants' last motion to terminate recordation of proceedings was denied by the District Court on October 17, 1974 (oral order). Defendants never sought review of either this order or the Court's previous order. Defendants' next attempt to terminate recordings was *not* made by appropriate motion before the Court below but was, instead, contained in defendants' opposition to plaintiffs' motion for enforcement, clarification, and sanctions, etc. (appendix M to the Petition). Although entitled as a "cross motion" it is not a proper affirmative motion, and, indeed, could not have been properly noticed with sufficient time to respond as required by the local Rules. Having failed to appeal two previous orders of the District Court, the defendants simply tacked on their request to terminate recordation of parole hearings in two pages at the end of a 22-page memorandum in opposition to plaintiffs' affirmative motion for enforcement and clarification. Defendants now improperly seek review of this Court from that "cross motion".

6. Defendants' lengthy delay in seeking review of this matter has resulted in it coming at a time when the matter of recordation of proceedings is for all practical purposes moot. Plaintiffs' counsel had already given serious consideration to voluntarily ceasing recordation of proceedings at the end of this week's (week of December 16th through 20th) hearings at San Quentin, the arrangements for which had already been made and over fifteen operators of machines already contacted. The stay has now succeeded, as a practical matter, in giving defendants everything they wanted on this issue. The disruption of the planned arrangements for recordation at San Quentin is such that it is unlikely that tapings can now be held. Under these circumstances (the next hearings at San Quentin will not be held until January—only two months before trial) and in order to avoid further delay or disruption, plaintiffs are prepared to terminate further tapings. To take up the matter on appeal now as defendants request would serve no purpose whatsoever.

7. This case is now set for trial on March 24, 1975, having been postponed once already at the request of these petitioners. The pretrial order is due next month on January 27th and most of the materials for the pretrial order are scheduled to be exchanged by counsel one week before that date on January 20th. Delay in the important aspect of discovery dealt with in petitioners' papers, most of which was originally ordered by the Court over four months ago, will inevitably create drastic readjustments in trial and



trail preparation schedules, and delay the trial of this matter. Under circumstances where, we respectfully submit, the District Court has been clearly correct in doing no more than ordering appropriate discovery under carefully circumscribed safeguards, there is ample reason to deny the petition.

Pursuant to Rule 1 of the Rules of this Court, it is requested that the three copies of this letter enclosed herein be distributed to the members of the panel considering this matter.

Respectfully submitted,

/s/ B. E. Bergesen, III
B. E. Bergesen, III
Attorney for Plaintiffs-Respondents

cc: Honorable Stanley A. Weigel
United States District Judge

cc: Karl S. Mayer, Esquire
Deputy Attorney General

Enclosures
BEB/cc

United States Court of Appeal
for the Ninth Circuit

No. 74-3392

Henry R. Kerr, et al.,
Petitioners

vs.

United States District Court,
Northern District of California,
Respondent

John Van Geldern, et al.,
Real Parties in Interest

[Filed Dec. 13, 1974]

ORDER

Before: DUNIWAY, Circuit Judge

The order of the district court made December 3, 1974 is hereby stayed pending further consideration of the pending petition for writ of mandamus.

/s/ Ben. C. Duniway
U. S. Circuit Judge



[Exhibit C]

United States Court of Appeals
for the Ninth Circuit

No. 74-3392

Henry R. Kerr, et al.,
Petitioners,

vs.

United States District Court,
Northern District of California,
Respondent,

John Van Geldern, et al.,
Real Parties in Interest.

[Filed Dec. 18, 1974]

ORDER

Before: MERRILL and DUNIWAY, Circuit Judges

The petition for writ of mandamus or prohibition and application for stay of discovery order, filed on December 13, 1974, is denied. The stay ordered by Judge Duniway on December 13, 1974, is vacated.

/s/ Charles M. Merrill
/s/ Ben. C. Duniway
United States Circuit Judges

[Letterhead of State of California
Office of the Attorney General
Department of Justice
State Building, San Francisco 94102]
Evelle J. Younger
Attorney General

[Filed Dec. 20, 1974]

December 19, 1974

Clerk, United States Court of Appeals
for the Ninth Circuit

United States Courthouse and Post Office Building
Seventh and Mission Streets
San Francisco, California 94101

Dear Sir:

Re: Kerr v. United States District Court
No. 74-3392

The following is petitioners' response to plaintiffs' letter dated December 16, 1974. Pursuant to Rule 1 of the rules of this court petitioners request this response be distributed to the court. Three copies are also enclosed.

1. Paragraphs one and five of plaintiffs' letter contend that petitioners' last motion to terminate recordings was denied by the District Court on October 17, 1974 (oral order). This is incorrect as the last motion to terminate was denied by the District Court's order dated December 3, 1974.

On October 24, 1974, petitioners filed a crossmotion to terminate the recordings (Appendix M, Argument



VIII, pgs. 20-22). Plaintiffs responded to this crossmotion (Appendix M, Argument VI, pgs. 9-10). This and other motions in the action were submitted to the District Court on October 31, 1974. At that time the District Court said a written order would be forth coming. On November 20, 1974, petitioners filed another crossmotion to terminate the recordings (Appendix Q, Argument VIII pgs. 11-12). This was submitted to the court, also with other motions in the action, on November 21, 1974, and at that time the District Court dictated to the reporter the text of the order signed on December 3, 1974.[1]

The text of the court's order of December 3, 1974 (Appendix R) begins with an acknowledgment both of plaintiffss' motions and of petitioners' countermotions:

> "The plaintiffs have moved for enforcement of this Court's Order dated August 12, 1974, for sanctions and for clarifications of said Order. Defendants have countermoved for sanctions and other relief. The motions having duly come on for hearing, all parties having been heard, and good cause appearing therefore, . . ." (Appendix R, p. 1, lines 12-18).

Petitioners counter motion to terminate the recordings were then denied by the order as follows:

[1]On November 21, 1974, the District Court directed counsel for plaintiffs to obtain in the Reporter's Transcript and to type and present the written order for the court's signature. Although this was done and the order was signed on December 3, 1974, counsel for petitioners did not receive the signed order until December 10, 1974, when it was necessary for counsel to go to the Clerk's office to obtain a copy of the signed order.

> "IT IS FURTHER ORDERED that the tape recordings of parole consideration hearings provided for by the Order of this Court dated August 12, 1974, continue unobstructed, and that such recordings include any and all utterances of hearing officers or other prison officials present before, during and after the time the inmate enters the hearing room." (Appendix R, p. 2, lines 25-30).

This language not only denies the petitioners' countermotion, but also extends the scope of the recordings to include "any and all utterances of hearing officers or other prison officials. . . ." The order of August 12, 1974 (Appendix F) required recording only of "all aspects of hearings . . . , including all deliberations and conversations between and among panel members relating to the hearings . . ." (Appendix F, p. 2, lines 21-23).

2. In *Procunier* v. *District Court,* No. 74-2510 in the files of this Court, a petition for mandamus was summarily denied without an opinion of the court, without any order that an answer to the petition be filed, and without any appearance by counsel for oral argument. On December 2, 1974, a petition for rehearing and suggestion for rehearing en banc was filed and is now pending. The result in No. 74-2510 should therefore not be considered of precedential value.

In *Kerr* v. *District Court,* No. 74-2206 in the files of this Court, an answer was ordered to be filed and the matter was orally argued before the court on November 14, 1974. As it thus appears the court will reach the merits of the questions raised there, and in



the present petition, and as the two cases involve similar discovery orders by the same judge in the same action in the District Court, that case has been noticed as related to the present petition.

3. Paragraph number four of plaintiffs' letter contends petitioners have not given the District Court a fair opportunity to assess the arguments presented to this court in the petition. This is incorrect. Petitioners' calls for an *in camera* inspection were before the District Court several times. They appear in "Defendant's Opposition to Plaintiffs Motion to Compel," filed June 3, 1974 (Appendix V, argument V, p. 8-11); in "Defendant's Request for Review of Magistrate's Findings and Recommendations," filed June 24, 1974 (Appendix D, argument I p. 3-6); and in "Defendant's Opposition to Plaintiffs Motion for Clarification and Sanctions, etc.," filed October 24, 1974 (Appendix M, p. 22 [incorporating by reference the papers filed June 3, 1974 (Appendix B) and June 24, 1974 (Appendix D)]). In addition, requests for *in camera* inspection of confidential documents in this case were made repeatedly and rejected in the other discovery order now being reviewed in case No. 74-2206.

Similarily, petitioners requests to terminate the recordings were made repeatedly and as often denied by the District Court. Such moving papers were filed August 26, 1974 (Appendix G); September 18, 1974 (Appendix I); October 16, 1974 (Appendix K); October 24, 1974 (Appendix M); and November 20, 1974 (Appendix Q).

It was with reluctance that petitioners filed the present petition. With one petition for mandamus already pending before this Court, petitioners had done all they could to resolve with counsel and in the District Court the serious questions raised in the second petition. This was done not once, but several times both with respect to the inspection of the confidential contents of inmate files, and with respect to the recordings. The situation worsened with each such attempt, resulting in a significant expansion of the scope of matters to be recorded, in the compelled indiscriminate disclosure of the confidential contents of inmate files, and in plaintiffs being granted the additional discovery right of photocopying any and all contents of such files.

4. Paragraph number six of plaintiffs' letter seems to be an attempt to moot the petition insofar as it seeks termination of the recordings. Although petitioners welcome this first expression of an intent to abandon further recordings, there remains the affirmative obligation, cast by the District Court's orders, to continue them. The court's order of August 12, 1974, states that "plaintiffs shall be responsible for operating said taperecorder and shall see to it that all aspects of hearings are recorded . . ." (Appendix F, p. 2, lines 19-21). The order of December 3, 1974, states:

"It Is Further Ordered that the tape recordings of parole consideration hearings provided for by the Order of this Court dated August 12, 1974, continue unobstructed . . ." Plaintiffs offer of Abandonment



would appear incomplete without approval of it by the District Court.

Respectfully yours,
Evelle J. Younger
Attorney General

/s/ Karl S. Mayer
Karl Mayer
Deputy Attorney General

KM:jl

cc: Hon. Stanley A. Weigel
United States District Judge

Sidney M. Wolinsky, Esq.
B. E. Bergerson III, Esq.

Supreme Court of the United States

No. A-546

Henry R. Kerr, et al.,
Petitioners,

v.

United States District Court,
Northern District of California, et al.

ORDER

Upon Consideration of the application of counsel for the petitioners,

It Is Ordered that the order entered by the United States District Court for the Northern District of California, cause Civ. No. 72-2088, on December 3, 1974, be, and the same is hereby, stayed insofar as it requires disclosure of material contained in the "central files" of the California Prison System pending further consideration when a memorandum for respondents is received.

/s/ William O. Douglas
Associate Justice of the Supreme
Court of the United States.

Dated this 31st day of December, 1974.



(511 F.2d 192)

United States Court of Appeals
for the Ninth Circuit

No. 74-2206

Henry W. Kerr, Curtis O. Lynum, Walter A. Gordon, Jr., Manley J. Bowler, Leland M. Edman, James H. Hoover, Charles E. Brown, Daniel R. Lopez, individually and in their official capacities as members of the California Adult Authority, Joseph A. Spangler, individually and in his official capacity as Administrative officer of the California Adult Authority, Raymond K. Procunier, individually and in his official capacity as Director of Corrections of the State of California; their agents, employees, and successors in interest,

Petitioners,

vs.

United States District Court for the Northern District of California,

Respondent,

John Van Geldern, Danny Jones, Charles Edward Van Nort, Billy Ray Lewis, Robert Newton Gardner, Jr., James Murrin, George Chatfield, individually and on behalf of all others similarly situated,

Real Parties in Interest.

[January 17, 1975]

On Petition for Writ of Mandamus
or Prohibition

OPINION

Before: HAMLEY, MERRILL and DUNIWAY, Circuit Judges.

HAMLEY, Circuit Judge:

Petitioners seek from this court a writ of mandamus or prohibition under 28 U.S.C. § 1651, vacating an

order of respondent district court which granted a motion of the real parties in interest requiring petitioners to produce various documents by way of discovery under Rules 34 and 37 of the Federal Rules of Civil Procedure. We deny the petition.

The real parties in interest, who seek the documents, are seven California state prisoners who have joined as plaintiffs in a civil rights action against petitioners in the respondent district court.[1] Plaintiffs in that suit assert district court jurisdiction under 28 U.S.C. § 1343, 42 U.S.C. §§ 1983 and 1988, and 28 U.S.C. §§ 2201 and 2202. Plaintiffs brought the action on behalf of themselves and of a class, divided into several subclasses, consisting of all others similarly situated.[2]

Petitioners in this mandamus proceeding are the defendants in the civil rights action described above. They constitute the members of the California Adult Authority, two state administrative officers, their agents, employees and successors in interest, as described in the caption of the complaint.

Plaintiffs in the civil rights action seek both declaratory and injunctive relief. They request a declaratory judgment that the acts of the defendants pertaining to the revocation, rescission or suspension of parole, the fixing or refixing of sentences, and the imposition of sanctions for alleged infractions of rules, as described in numerous paragraphs of the complaint, contravene the rights of the plaintiffs and their class under the Fifth, Sixth and Eighth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution.

[1] In the district court the civil rights action carries docket number C-72-2088 SAW.

[2] After the petition was filed in this court, the district court entered an order providing that the suit could be maintained as a class action.



The injunctive relief plaintiffs seek is an order requiring defendants and their agents to accord plaintiffs and their class certain specified procedural rights with regard to all proceedings for the revocation, suspension or rescinding of parole, the fixing or refusing to fix the terms of sentences, and the imposing of serious disciplinary sanctions. The rights sought pertain to giving notice of such proceedings, providing an opportunity to be heard, to present witnesses, and to cross-examine witnesses; according the right to be represented by counsel; providing the right to be heard by an unbiased panel or official and the right to challenge any panel or official for cause; and providing a verbatim transcript of any such hearing and a written statement of the reason for the action taken and the evidence relied on.

During the course of discovery in the civil rights action, plaintiffs served upon petitioners a set of interrogatories under Fed. R. Civ. P. 33 and a request for production of documents under Fed. R. Civ. P. 34. Petitioners made objections to the requests for documents and to certain interrogatories. As to the requested documents, petitioners also argued that an *in camera* inspection was necessary in order to determine relevancy and evaluate their claimed privileges. Plain-

tiffs thereupon moved under Fed. R. Civ. P. 37 to compel discovery. The district court referred the motion to a United States magistrate for findings and recommendations.

Following a hearing, the magistrate recommended that all requests for production of documents be granted, that some but not all of the interrogatories be answered, and that costs in the amount of $500 be levied against petitioners under Fed. R. Civ. P. 37(a)(4). Protective orders concerning certain of the document requests were also suggested.[3]

Petitioners sought a review by the district court of the magistrate's findings and recommendations, complaining primarily about the granting of the requests for the production of documents. After such a review, the district court, with reference to the documents here in issue, followed the magistrate's recommendations, including denial of the request for *in camera* inspection. However, the district court modified the recommended protective order by being more restrictive of the persons to whom the documents in request number seven could be revealed.[4] Subsequently,

[3]Several document requests were subject to a limited time period. And with reference to request number seven, the magistrate advised limiting the revelation of the documents to plaintiffs' attorneys and the personnel in their offices.

[4]The protective order with reference to request number seven, as entered by the district court, reads:

"[T]hat no . . . file of any plaintiffs, or any copy of any of its contents, and no personnel file of any member of the Adult Authority, hearing representative or executive officer, nor any copy of any of its contents, shall be shown to any person except counsel of record for the plaintiffs and no more than a total of two investigators designated by such counsel, and then only to the extent necessary to the conduct of this action."



the district court refused to stay the discovery order pending the disposition of this petition.

Being dissatisfied with the district court's order under Fed. R. Civ. P. 37, petitioners instituted this mandamus or prohibition proceeding and requested a stay pending its disposition. The petitioners contend that it was improper for the district court to allow discovery of the documents requested under Fed. R. Civ. P. 34, specifically those sought in requests numbers 7, 14, 15, 18, 20, 21 and 22 of the plaintiffs' request for production of documents.[5] This court

[5]The requests for documents at issue are:

"7. All files, including all personnel files, which are maintained by the Adult Authority or by the Department of Corrections, or by any officer or employee thereof, with respect to each member, each hearing representative, and the Executive Officer of the Adult Authority."

"14. Each report submitted by any member, hearing representative, Executive Officer, or any other employee or official of the Adult Authority, including without limitation all reports of the type indicated at lines 9-11 of page 21 of the aforementioned deposition."

"15. All written statements written or delivered by any member or hearing representative or the Executive Officer of the Adult Authority during the past 5 years favoring, opposing, or in any way commenting upon bills or other legislation or legisative proposal pending in the U.S. House of Representatives, the Senate of the United States, or the California Legislature."

"18. All written proposals for any change whatsoever in the organization or operation of, qualifications for, or substantive criteria and procedures to be employed by the Adult Authority, including without limitation any of the individuals or groups listed in the foregoing item."

"20. All memoranda written by the Chairman of the Adult Authority during the past 5 years, no matter to whom sent, including without limitation memoranda sent to other government organizations, agencies or officials, or to other members, hearing representatives, officials or employees of the Adult Authority."

"21. All documents in effect on November 15, 1972 which pertain to any Policy Statement or Resolution issued by the Adult Authority, including without limitation any file main-

stayed the district court's order on September 20, 1974, at which time it also designated this petition for oral argument.

Preliminarily, it is necessary to examine the nature of the vehicle which brings the district court's order before this court for review. This is a petition for mandamus or prohibition pursuant to the All Writs Act, 28 U.S.C. § 1651. Mandamus is an extraordinary remedy. It is appropriately exercised where the district court has exceeded its jurisdiction, or has improperly failed to exercise jurisdiction, or has taken action amounting to an "usurpation of power." *Will v. United States,* 389 U.S. 90, 95-96 (1967); *Roche v. Evaporated Milk Ass'n.,* 319 U.S. 21, 26 (1943). This court set out its standard for granting mandamus in *Hartley Pen Co. v. United States District Court, etc.,* 287 F.2d 324, 328 (9th Cir. 1961).

> "In our view the remedy is available in an ordinary case within our jurisdiction if ordinary remedes are inadequate and there are present exceptional and extraordinary circumstances which require the issuance of an extraordinary writ to prevent a grave miscarriage of justice. . . ."[6]

tained on any Resolution or Policy Statement and all such documents executed or issued subsequent to that date."

"22. All documents, however formal or informal, issued during the *past calendar* year, which concern the Adult Authority's adoption of new policies, procedures, criteria, and the like, to be followed by members, hearing representatives, officials and employees, including without limitation all documents relating to a) Policy Statement No. 24, adopted March 27, 1973, and b) Resolution No. 129, revised and reissued May 21, 1973."

[6]The standard, for when mandamus should be granted to review interlocutory discovery orders, is in flux between circuits.



From an examination of *Hartley,* three factors are evident which determine the appropriateness of granting mandamus: the degree to which the district court's actions can be legally questioned, the damage to petitioner (not correctable on appeal), and the ability to correct the district court's actions by appeal. *See Heathman v. United States District Court,* 503 F.2d 1032 (9th Cir. 1974); *Belfer v. Pence,* 435 F.2d 121 (9th Cir. 1970).

Petitioners first direct their attention to the documents described in request number seven. *See* note 5, *supra.* These documents consist of the personnel files maintained by petitioners pertaining to each member of the Adult Authority, each hearing representative, and the Executive Officer of the Adult Authority. On the merits of the district court order, petitioners argue that the contents of these personnel files have no relevance to the subject matter of the civil rights action, and for this reason alone, the district court discovery order should be vacated with regard to request number seven.

One of the plaintiffs' allegations in their civil rights complaint is that members and executive personnel of the Adult Authority have "no expertise in arriving at fair decisions" because of their narrow partisan backgrounds, their bias against prisoners, their inexperience, and their failure to reflect a representative

4 *Moore's Federal Practice* § 26.83 [9.—3] (2d ed., Supp. 1973). There is some authority for lessening the extraordinary showing necessary to invoke mandamus. *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), aff'd., 400 U.S. 348 (1971) (by an equally divided court); *Pfizer, Inc. v. Lord,* 456 F.2d 545 (8th Cir. 1972).

cross secton of the population of California. As indicated by the earlier review of the relief sought in the civil rights suit, plaintiffs do not attack the qualifications of petitioners with an expectation of obtaining a judicial determination that an Adult Authority so constituted cannot accord due process to prisoners who come before them. Instead, they expect that, by proving such an allegation, they will demonstrate the need of imposing stringent procedural requirements governing the functioning of the Adult Authority.

Since this would appear to be a proper line of attack for plaintiffs, the district court's holding of the personnel files relevant for discovery purposes is not so questionable as to invoke mandamus. For the question of relevancy "is to be more loosely construed at the discovery stage than at the trial." 8 Wright & Miller, *Federal Practice and Procedure,* § 2008 at 41 (1970). Thus under Fed. R. Civ. P. 26(b)(1), it is no ground for objection that information sought in pretrial discovery would not be admissible at trial, " 'if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence.' . . ." *Olympic Refining Company v. Carter,* 332 F.2d 260, 266 (9th Cir. 1964). In addition to discovering information pertaining to a party's case in chief, it is entirely proper to obtain information for other purposes such as cross-examination of adverse witnesses. *See United States v. Meyer,* 398 F.2d 66, 72 (9th Cir. 1968).

Because the issue of relevancy in discovery matters is subject to such a broad standard, a district court's



decision will rarely be overturned by a petition for mandamus.[7] *Heathman v. United States District Court* 503 F.2d at 1035. *Cf. Hartley Pen Co. v. United States District Court,* 287 F.2d at 328-332.

Petitioners argue, however, that established principles of California law and federal law create an absolute or qualified privilege for the personnel files covered by request number seven and all documents sought under requests numbers fourteen, fifteen, eighteen, twenty, twenty-one and twenty-two, and for this reason discovery should not have been ordered. In the alternative, petitioners argue that, at the very least, the district court should have required *in camera* inspection to ascertain relevancy and judge the need to maintain the confidentiality of the Authority's files.

The claim of privilege under California law is based upon California Evidence Code § 1040, and California Government Code §§ 6250-6260 and 6254(f) (Supp. 1974). However, the civil rights action was instituted in federal court under a federal statute, 42 U.S.C. § 1983, which was enacted particularly to vindicate federal rights against deprivation by state action. *See Monroe v. Pape,* 365 U.S. 167, 180 (1961). As this court recently pointed out in *Heathman v. United States District Court,* 503 F.2d at 1034: "[I]n federal question cases the clear weight of authority and logic supports reference to federal law on the issue of the

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[7]For an example of where the determination on relevancy was found extraordinary and mandamus invoked, *see Sanderman v. Winner,* ..... F.2d ....., No. 74-1477 (10th Cir. Nov. 26, 1974).

We make no inference as to whether the information contained in the personnel files would be admissible at trial, as against a claim that it is irrelevant.

existence and scope of an asserted privilege. 2B Barron & Holtzoff, *Federal Practice and Procedure* Wright ed) 1961), § 967 at 243; 4 *Moore's Federal Practice,* § 26.60 [7] at 26-255; 8 Wright & Miller, *Federal Practice and Procedure,* Civil § 2016 at 123; *Proposed Federal Rules of Evidence,* Rules 501-02."

The state's interest is that of a litigant, and not, as in diversity cases, that of a sovereign whose law is being applied in a foreign forum. Reference to federal law in this case is necessary on the issue of the existence and scope of the claimed privilege. *Heathman v. United States District Court,* 503 F.2d at 1034; *Fears v. Burris Manufacturing Co.,* 436 F.2d 1357, 1360-1361 (5th Cir. 1971); *Carr v. Monroe Manufacturing Co.,* 431 F.2d 384, 387-389 (5th Cir. 1970); *Colton v. United States,* 306 F.2d 633, 636 (2d Cir. 1962).

Federal statutory law, the Freedom of Information Act, 5 U.S.C. §§ 552(b)(6) and (7), is relied upon by petitioners to sustain their asserted privilege. The purpose of this Act was to expand the access of the public to official records of federal agencies, subject to stated exceptions. Among the exceptions to disclosure are those set out in § 552(b)(6)—personnel and medical files, and section 552(b)(7)—"investigatory files compiled for law enforcement purposes."[8]

This Act would not create a privilege for the requested documents for two reasons. First, its language is limited to authorities "of the Government of

[8]The section 552(b)(7) exception has no relationship with the kinds of documents plaintiffs seek to discover. *See Bristol-Myers Co. v. F.T.C.,* 424 F.2d 935, 939-940 (D.C. Cir. 1970).



the United States." 5 U.S.C. § 551(1). The civil rights suit involves California agencies. Secondly, the exceptions to the disclosure in the Act were not intended to create evidentiary privileges for civil discovery. *See Verrazzano Trading Corp. v. United States,* 349 F.Supp. 1401, 1403 (Cust. Ct. 1972); *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 99 (W.D. Mo. 1973); *Hodgson v. GMAC,* 54 F.R.D. 445, 446 (S.D. Fla. 1972); 4 *Moore's Federal Practice* § 26.61 [4.—3] at 26-276, 26-278 (2d ed.). They were intended only to permit the withholding of certain types of information from the public generally.

Petitioners also contend that the common law governmental privilege (encompassing and referred to sometimes as the official or state secret privilege) covers the requested documents. *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792-795 (D.C. Cir. 1971); *Carr v. Monroe Manufacturing Co.,* 431 F.2d at 388-390.

These cases, however, indicate that this is only a qualified privilege, contingent upon the competing interests of the requesting litigant and subject to disclosure especially where protective measures are taken, as in this case. But we do not have to reach the question of whether this privilege extends to these documents or if a further protective order in the nature of *in camera* inspection was necessary before allowing disclosure. The governmental privilege must be formally asserted and delineated in order to be raised properly. *United States v. Reynolds,* 345 U.S. 1, 7-8, 10-11 (1953); *Carr v. Monroe Manufacturing Co.,* 431

F.2d at 387. *See General Services Administration v. Benson,* 415 F.2d 878, 879 (9th Cir. 1969). *Cf. United States v. Nixon,* ..... U.S. ....., ..... (July 24, 1974) ("by a formal claim of privilege"); *Committee for Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d at 792-793 (by implication).

In *United States v. Reynolds, supra,* the Supreme Court in discussing a claimed state secret privilege stated:

> "The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. . . ." 345 U.S. at 7-8.

Neither the Chairman of the Authority nor the Director of Corrections nor any official of these agencies asserted, in person or writing, any privilege in the district court.

The claiming official must "'have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced'"[9] and state with specificity the rationale of the claimed privilege. *Reynolds* is illustrative. The Court there continued, explaining:

[9] *United States v. Reynolds,* 345 U.S. at 8 n. 20, quoting *Duncan v. Cammell, Laird & Co.* [1942] A.C. 624, 638.



> "Of course, even with this information before him, the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that *military secrets* were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its compulsion that had then been made." (Emphasis added.) 345 U.S. at 10-11.

In the civil rights suit, petitioners' counsel merely raised a blanket objection covering any and all documents in request numbers 7, 14, 16, 18, 20, 21 and 22. Formally claiming a privilege should involve specifying which documents or class of documents are privileged and for what reasons, especially where the nature of the requested documents does not reveal an obviously privileged matter. *See Pleasant Hill Bank v. United States,* 58 F.R.D. at 101. Since there may be information in the requested documents which should be protected, the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek *in camera* inspection, at the time the documents are discovered in the district court. *See United States v. Reynolds,* 345 U.S. at 10-11.

In sum, the petition fails to show such an usurpation by the district court that warrants the extraordinary

remedy of writ of mandamus. In promulgating the discovery order the district court did enter some protective measures. The granting of mandamus as to discovery orders is limited, and this case does not appear to present exceptional circumstances.

The stay of this court is vacated, and the petition for mandamus or prohibition is denied.



United States Court of Appeals
for the Ninth Circuit

No. 74-2206

Henry R. Kerr, et al.,
Petitioners,
vs.
United States District Court for the Northern District of California,
Respondent,
John Van Geldern, et al.,
Real Parties in Interest.

[Filed Jan. 27, 1975]

ORDER STAYING ISSUANCE OF MANDATE

Upon application of Karl S. Mayer, counsel for the Petitioners, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioners herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before February 17, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the

final disposition of the case by the Supreme Court of the United States.

/s/ Charles M. Merrill
United States Circuit Judge.

Dated: San Francisco, Calif.



Supreme Court of the United States

No. A-546

HENRY R. KERR, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF CALIFORNIA, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners and the response of the real parties in interest filed thereto,

IT IS ORDERED that my order entered December 31, 1974, be, and it is hereby, continued pending the timely filing of a petition for a writ of certiorari in the above-entitled cause. If such a petition is so timely filed, this order is to remain in effect pending this Court's action on the petition. Should the petition for a writ of certiorari be denied, ths order is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order is to continue pending the sending down of the judgment of this Court.

s/ William O. Douglas
Associate Justice of the Supreme
Court of the United States.

Dated this 1st
day of February, 1975.

United States Court of Appeals
for the Ninth Circuit

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No. 74-2206

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HENRY R. KERR, et al.,
Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

JOHN VAN GELDERN, et al.,
Real Parties In Interest.

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[Filed Feb. 13, 1975]

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ORDER STAYING ISSUANCE OF MANDATE

Upon application of Karl S. Mayer, Deputy Attorney General, counsel for the Petitioners, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41 (a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioners herein, provided such petition is filed in the Clerk's



Office of the Supreme Court of the United States on or before February 28, 1975.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Charles M. Merrill
United States Circuit Judge,

Dated: San Francisco, Calif.

# In the Supreme Court
OF THE
# United States

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OCTOBER TERM, 1974

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No. 74-1023

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HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*
JOHN VAN GELDERN, et al., *Real Parties in Interest.*

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## BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI

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IN THE SUPREME COURT

OF THE

UNITED STATES

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October Term, 1974

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NO. 74-1023

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HENRY W. KERR, et al., Petitioners,

vs.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA, Respondent,

JOHN VAN GELDERN, et al.,
Real Parties in Interest.

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Brief in Opposition to Petition
For Writs of Certiorari

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## STATEMENT

These petitions for a writ of certiorari raise a narrow issue in a case where the court below expressly declined to reach the major claims advanced by petitioners in that court and in the District Court.

Thus the decision of the court below -- which in any event is clearly correct -- is a particularly inappropriate one for this Court to review by way of certiorari.

The underlying case is a civil rights action brought under 42 U.S.C. §1983, by seven California state prisoners, on behalf of themselves and all others similarly situated. On August 1, 1974, the District Court entered an order that the action was to be maintained as a class action under Rule 23(b)(2), F.R.Civ.P., on behalf of "all adult male felons who now are, as well as all adult male felons who in the future will be, in the custody of the California Department of Corrections, whether confined in an institution operated by the Department or on parole."

Plaintiffs and their class contend that various components of the present

parole-granting system -- which permits defendant members of the Adult Authority (the California parole board) to exercise virtually unlimited discretion over the length of terms of prisoners sentenced under California's indeterminate sentence law -- violates the Sixth and Fourteenth Amendments of the United States Constitution. Specifically, plaintiffs have alleged -- and must therefore prove at trial -- that the board members have no expertise in term-fixing and parole revocation; that the written materials upon which they primarily rely are, to a significant degree, false and/or unreliable; that the hearings themselves are fatally defective because the board members have insufficient time and because the prisoner is unable, without counsel, to adequately represent himself; that the board members

operate in the absence of adequate procedural safeguards or substantive criteria; and that the decisions reached by the board are consistently arbitrary and discriminatory. As a result of these defects, respondents seek declaratory and injunctive relief requiring that certan specific procedural safeguards attend those hearings at which terms may be fixed and parole may be granted, rescinded, or revoked.

After preliminary motions by defendants to dismiss the case had been denied by the District Court and by the court below, respondents served upon petitioners a request for the production of documents under Rule 34, Federal Rules of Civil Procedure, including those documents which are the subject of the instant petition for a writ of certiorari, and which are described in the opinion of the court below

(see Ex. A to Pet. at v, n.5). Initially, petitioners simply refused to answer or object to the Rule 34 request until they were expressly ordered to do so by the District Court. Thereafter, petitioners filed a response which, inter alia, objected to producing the documents here at issue on the grounds that they were privileged. However, no officer of the agencies involved asserted, "in person or in writing, any privilege in the District Court" (id. at xii), nor did any such official set forth the rationale of the claimed privilege or even identify any specific documents as coming within the privilege. Instead, "petitioners' counsel merely raised a blanket objection covering any and all documents" which might be responsive to those requested by respondents (Ex. A to Pet. at xiii).

Subsequently, petitioners filed a separate Rule 34 request for production of the central files of every twentieth inmate in the California prison system, since those files are the only documents upon which the parole board bases its decisions. Therefore, in order to document their claims that the parole granting process involves the resolution of complex factual issues, which requires the due process safeguards contended for by respondents; that the inmates appearing before the board are often incapable of representing themselves (because, e.g., they are on heavy medication, have low IQs, or language difficulties, etc.); that the parole board members are incapable, due to time constraints and their own training and experience, of analyzing the complex medical and psychiatric

material contained in these files; that legally impermissible criteria are used in denying parole; and that the files themselves contain a considerable amount of false and misleading material, it is necessary for plaintiffs to have access to at least a representative selection, especially since counsel for petitioners has access to each and every one of these files. As with the documents described above, petitioners strongly resisted the requested discovery, necessitating extensive proceedings in the District Court pursuant to Rule 37, Federal Rules of Civil Procedure.

These proceedings -- with respect to both Rule 34 requests -- took the form of full hearings before a United States Magistrate and thereafter the District Court, and eventuated in two orders by the Dis-

trict Court that petitioners produce the documents requested (see Ex. B and D to Pet.). However the orders requiring production also contained various protective provisions which (1) limited the inspection of certain documents to the attorneys (and two investigators and law students) representing respondents (Ex. B at xvi; Ex. D at xxvi); (2) charged respondents' attorneys with protecting the confidentiality of all files inspected by them (Ex. D at xxviii); (3) limited the uses which could be made of the files to those connected with the litigation (Ex. B at xvi; Ex. D at xxviii); and (4) required counsel for respondents to obtain advance written permission from any inmate whose file they wished to inspect (Ex. D at xxvii). Petitioners nonetheless sought review of each order by way of two peti-

tions for mandamus filed in the court below. One petition was summarily denied on December 18, 1974 (see Ex. C to Pet.), and the other petition received a full hearing before it was denied by the court below pursuant to an opinion entered on January 17, 1975 (Ex. A to Pet.).

In the courts below, petitioners asserted that the documents in question fell within certain state and federal privileges or that, in the alternative, the District Court should at least have conducted an in camera inspection of the documents before ordering their disclosure. However, the court below declined "to reach the question of whether this privilege extends to these documents or if a further protective order in the nature of in camera inspection is necessary before allowing disclosure" (Ex. A at xi). In-

stead, it held that the privilege itself had not been properly lodged by the head of the department which had control over the documents, after personal consideration by him. Such a claim, the court held, requires the officer to designate which documents are privileged and to "state with specificity the rationale of the claimed privilege" (id. at xii). Since no such claim had ever been lodged in the District Court -- petitioners having filed only "a blanket objection covering any and all documents" (ibid.) -- the court denied the petition. It noted, however, that "[s]ince there may be information in the requested documents which should be protected, the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek in camera inspection, at the time the documents are

discovered in the District Court" (id. at xiii).

Petitioners, however; did not choose to follow the suggestion of the court below that they submit adequate claims of privilege in the District Court. Instead, they have asked this court to review (by way of certiorari) the opinion of the court below, and to review (by mandamus) the underlying discovery orders of the District Court.

Question Presented

Is it an abuse of discretion for a District Court to require a government agency, which objects to producing documents requested under Rule 34 of the Federal Rules of Civil Procedure on the ground that they come within a governmental privilege, to lodge a formal claim of privilege which (1) specifies the documents

for which the privilege is claimed, and (2) states with specificity the rationale of the claimed privilege?

ARGUMENT

In the court below, petitioners' two principal arguments were (1) that the documents here in question were privileged under federal and state law, and (2) that the District Court was required to conduct an in camera hearing before ordering disclosure. That court, however, expressly declined to reach either question (Ex. A at xi), although it did reject two statutory claims of privilege which petitioners do not pursue in the instant petition. Instead, it issued a narrow decision that in order to invoke a qualified governmental privilege or obtain an in camera hearing the privilege "must be formally asserted and delineated in order to be

raised properly" (id. at xi).

Deprived in this fashion of a ruling on their principal objections to the underlying discovery orders, petitioners have strained mightily in their instant petition for a writ of certiorari to articulate new issues of importance which would justify plenary consideration by this Court. In doing so, they appear to be arguing that where, as here, an attorney representing the head of a governmental agency asserts a blanket objection to producing documents under Rule 34, on the ground that they are covered by a qualified governmental privilege, the failure of a District Court to conduct an in camera inspection necessarily violates the Fourth Amendment and Rule 26, Federal Rules of Civil Procedure (see Pet. at 6-7). Yet as we shall show, the decision of the

court below is clearly correct and, in any event, yields no issue which is worthy of this Court's consideration by way of certiorari.

## I

## THE COURT BELOW WAS CLEARLY CORRECT IN REQUIRING A CLAIM OF GOVERNMENTAL PRIVILEGE TO BE FORMALLY ASSERTED AND PROPERLY DELINEATED

The heart of the ruling of the court below -- which follows well-established law in requiring a governmental agency to follow certain minimum procedures when invoking a privilege -- consists of two separate points. First, that the privilege must be claimed by an officer of the agency who must, after personal consideration, explain to the court the reasons for the claimed privilege. And second, that in objecting to the production of documents

on the ground of privilege, a party must specify which portions of the documents are allegedly privileged and for what reasons.

A. A Formal Claim of Privilege Must Be Lodged By the Head of the Department.

Following United States v. Reynolds, 345 U.S. 1,8n.20(1953), the court below held that the claim of privilege by a governmental agency must be formally asserted by the head of the department who must "'have seen and considered the contents of the documents and himself have formed the view that on the grounds of public interest they ought not to be produced'" (Ex. A to Pet. at xii) (emphsis supplied). The court below further held that the agency's submission must "state with specificity the nature of the claimed privilege" (ibid.). Such a

requirement is not only correct as a matter of law, but is eminently sensible on policy grounds as well.

First, this Court has said that even where military secrets are concerned, the governmental privilege "is not to be lightly invoked." United States v. Reynolds, supra, 345 U.S. at 7-8. By requiring that the privilege be asserted by a department head rather than by counsel, a meaningful brake is put upon the indiscriminate use of the privilege.

Second, the privilege is to be asserted with respect to documents only if their production would injure the public interest. Since it is plain that in many situations (e.g., the Nixon tapes) the disclosure of documents which would in no way injure the public interest would indeed injure the position of a

party litigant, it makes considerable sense to require that the claim be not only lodged but also elaborated upon by a department head rather than by counsel.

Third, it is essential for the court to obtain "with specificity" the reasons which, in the considered opinion of the agency itself, would make disclosure harmful to the public interest. In this regard, petitioners entirely miss the mark when they argue (Pet. at 25-26) that the policies "on which the department would rely are different from the policies on which the court would rely to evaluate the claim of privilege" (id. at 26). Of course they are different: but to perform its role -- in striking the balance between the competing needs for confidentiality and disclosure -- the District Court clearly needs to know, not that

documents are considered to be "confidential", but rather why they are considered to be confidential, and what specific harm is foreseen by the department head if they are disclosed. For only if a court has such information is it in a position to closely scrutinize the validity of the claimed privilege, and also determine what sort of protective order, if any, would sufficiently obviate that harm so as to justify disclosure.

This very case furnishes a good example of the need for such requirements. In the District Court, the governmental privilege was never asserted by an officer of the Adult Authority or the Department of Corrections -- after personal consideration, for reasons related to the public interest -- but rather by the Attorney General, whose position in the underlying

litigation has been greatly enhanced by withholding the documents in question from the plaintiffs. (The documents were first requested by respondents in June of 1973, and their production has been ordered by the United States Magistrate, the District Court, and the court below; yet at this writing, in March of 1975, with a trial date of June 9, 1975, the documents are still being successfully withheld by petitioners.)

Of greater significance, however, is the fact that the District Court was not furnished any explanation whatsoever as to <u>why</u> the public interest would be harmed by the disclosure, especially where, as here, a strong protective order was entered. Nor, as we shall presently discuss, was the court even told what specific documents are involved, and what

portions of them are deemed to be privileged. Rather, the court had before it only the sweeping and conclusory statement by the counsel of the party resisting discovery that all of the documents at issue were privileged or confidential. In such a case, the wisdom -- indeed, the necessity -- of the rule requiring personal consideration by a department head, followed by a specific description of the harm to the public interest in the event of disclosure in litigation, becomes manifest.

B. The Documents For Which Privilege is Claimed Must Be Designated by the Party Resisting Discovery.

As earlier noted, petitioners made no attempt to identify the documents called for by respondents' Rule 34 request; to designate those portions of the documents for which the privilege was claimed;

or to inform the District Court of the particular reasons for claiming the privilege. Instead, they baldly asserted a blanket privilege, covering whatever documents might be involved, and insisted that the District Court either uphold the privilege or conduct an in camera inspection of all of the (unspecified) documents.

However, in camera inspection under such conditions would be highly inappropriate, for the several reasons discussed in the comprehensive opinion in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973).[1/]

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1/ Although Vaughn v. Rosen, supra, is a case involving disclosure of documents under the Federal Freedom of Information Act, the considerations discussed by the court in its careful and comprehensive decision are precisely those at issue whenever a party resisting discovery under Rule 34 invokes a governmental privilege and seeks in camera inspection.

In Vaughn the court pointed out that the tactic of joining a blanket assertion of governmental privilege with a demand for in camera inspection (1) deprives the discovering party of an opportunity to contest the government's characterization of the documents as confidential and (2) places an enormous burden on the lower courts. For these reasons the court in Vaughn set out guidelines which require an agency resisting disclosure to (1) designate the documents which are to be withheld; (2) specify in detail which portions of the document are disclosable and which are allegedly exempt; and (3) submit a relatively detailed analysis of why the document is exempt from disclosure. Such a procedure, the court held, would permit more adequate adversary testing and would alleviate the burden placed upon the

District Court. Certainly this approach is consistent with the overwhelming authority, never contested by petitioners at any stage in the District Court or in the court below, which places upon a party opposing discovery the burden of showing that the documents are in fact privileged. 2/

Thus at a time when courts are properly requiring more specificity from governmental agencies seeking to withhold documents on the basis of "confidentiality", petitioners are asking this Court for a ruling that a party resisting discovery under Rule 34 need only file a blanket

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2/ See, e.g., Rogers v. Tri-State Materials Corporation, 51 F.R.D. 234, 247 (N.D. West Va. 1970); Apco Oil Corp. v. Certified Transport., Inc., 46 F.R.D. 428, 432 (E.D. Mo. 1969); Pleasant Hill Bank v. United States, 58 F.R.D. 97, 101 (W.D. Mo. 1973); Advisory Committee's Note to 1970 Amendment to Rule 33(a), 48 F.R.D. at 523; 8 Wright & Miller, Federal Practice and Procedure, at 265, 542-43.

claim of "privilege" in order to either (1) escape discovery altogether or (2) require a District Court, unaided by the illumination which the contending parties could provide, to conduct its own in camera inspection, regardless of how burdensome such a task might be. For under the circumstances of this case -- where petitioners never identified, in the District Court, either the documents involved or the rationale behind their claim of privilege -- that is exactly the rule which this Court would have to adopt in order to reverse the narrow ruling of the court below.

## II

## NEITHER THE RULING OF THE COURT BELOW, NOR THE UNDERLYING DISCOVERY ORDER OF THE DISTRICT COURT, VIOLATES THE FOURTH AMENDMENT

Petitioners' Fourth Amendment arguments -- unsupported by citation to any authority -- are wholly without merit. The constitutionality of Rule 34, Federal Rules of Civil Procedure -- requiring the production of documents which are relevant to the subject matter of a pending action and are not privileged -- has never been thought to run afoul of the Fourth Amendment. See 8 Wright & Miller, supra, §2202 at 587-89, and authorities cited therein. As petitioners necessarily concede, the Fourth Amendment requires only that the disclosure sought shall not be

unreasonable, United States v. Morton Salt Co., 338 U.S. 632 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946), and neither the ruling of the court below nor the underlying discovery orders of the District Court can be considered unreasonable under the circumstances of this case.

In the first place, petitioners continually attempt to characterize the documents in question as confidential hence privileged, and to characterize the District Court's refusal to conduct an in camera inspection as a refusal to make an informed resolution of the competing considerations of disclosure and confidentiality. Yet the ruling of the court below merely holds that if the governmental agency whose documents they are wishes to invoke a privilge or to obtain in camera

inspection, the privilege must be "formally asserted and delineated in order to be raised properly" (Ex. A to Pet. at xi). Surely it cannot be considered "unreasonable", under the circumstances of this case, to require that an officer of the appropriate agency personally consider and pass upon the privilege to be invoked, or that he thereafter "state with specificity the rationale of the claimed privilege" (id. at xi). Cf. United States v. Morton Salt Co., supra, 338 U.S. at 653. Nor, when petitioners failed to file such a statement, but instead submitted a sweeping assertion by their attorney that all of the documents asked for were "privileged", was it unreasonable for the District Court to issue an order requiring production, subject to the provisions of a strict protective order. Indeed,

upon remand petitioners may still "assert a privilege to a particular document or class of documents, and perhaps seek in camera inspection, at the time the documents are discovered in the District Court" (id. at xiii).

Furthermore, there are many situations in which it is not unreasonable for a District Court -- before which a privilege has been asserted in response to a Rule 34 request for production -- to weigh the competing interests of confidentiality and disclosure, and, without an in camera inspection, strike the balance in favor of disclosure. In fact, such decisions are made every day in the District Courts, and petitioners are necessarily unable to cite any case which holds that in camera inspection is required whenever a privilege is rejected. In this case, as we

have seen, (1) petitioners made no showing that the documents were confidential, or that petitioners would be injured by disclosure; (2) the documents are not only clearly relevant (as found by the Magistrate, the District Court, and the court below) but are crucial, since they lie at the very heart of the case in the District Court; (3) whatever harm might conceivably arise from their disclosure in litigation was all but eliminated by the entry of a strong protective order; and (4) the documents are those of a public agency, cf. United States v. Morton Salt Co., supra, 338 U.S. at 652, whose main function is deciding whether or not to maintain thousands of persons in prison pursuant to procedures attacked in the underlying litigation as unconstitutional. Under these circumstances, it can hardly be considered

"unreasonable" for the District Court to have struck the balance between confidentiality and disclosure in favor of the latter. Nor can it possibly be said that such a finding of reasonableness is an abuse of discretion or a "usurpation of power" such as to justify review by way of mandamus. See Will v. United States, 389 U.S. 90, 95-96 (1967); Roche v. Evaporated Milk Ass'n., 319 U.S. 21, 26 (1943).

## CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the instant petition for writs of certiorari should be denied.

March 6, 1975

Respectfully submitted,

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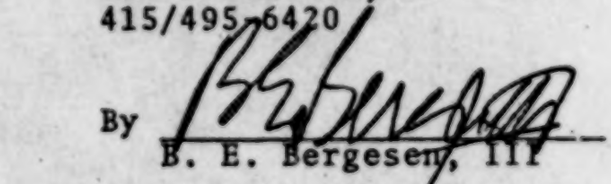
By 
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Supreme Court, U. S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1974

## No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR PETITIONERS

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# In the Supreme Court
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OCTOBER TERM, 1974

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HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF FOR PETITIONERS

---

### OPINION AND DECISIONS BELOW

To be reviewed in this action are two sets of decisions relating to the compelled production of confidential state government documents for adversary inspection in one action in the United States District Court. One set of decisions relates to the production of inmate files and the other set to the production of personnel files and numerous categories of government correspondence, memoranda, etc. Each set is comprised of magistrate's findings and recommendations,

district court orders, and decisions of the Court of Appeals on denial of defendants'[1] separate applications for mandamus.

**A. The Decisions Concerning the Compelled Production of Inmate Files:**

The order of the Court of Appeals, dated December 18, 1974, has not been reported. This order is contained in the appendix to the petition for writ of certiorari, page xxxiii. The underlying discovery order of the district court, dated December 3, 1974, (A. 647) has not been reported. This order is included in the appendix to the petition for writ of certiorari, pages xxv-xxviii. The district court's order incorporates the text of an earlier discovery order of that court, dated August 12, 1974, and the August 12, 1974 order, in turn, incorporates the magistrate's findings and recommendations dated June 11, 1974. The district court's order of August 12, 1974 is printed in the appendix to the petition for writ of certiorari, pages xxix-xxxiii; the magistrate's findings and recommendations of June 11, 1974 is printed in the appendix to the petition for writ of certiorari, pages xxxiv-xlii.

**B. The Decisions Concerning the Compelled Production of Personnel Files, etc.:**

The opinion of the Court of Appeals, dated January 17, 1975, is reported at 511 F.2d 192 (9th Cir. 1975). This opinion is printed in the petition for writ of certiorari appendix pages i-xvi, and in the Single

[1]Throughout this brief the parties are referred to as defendants or plaintiffs according to their designation in the action in the district court.



Appendix (A. 707). The underlying discovery order of the district court dated June 20, 1974, as well as the magistrate's findings and recommendations, dated April 24, 1974, which are incorporated by reference in the district court's order, are also printed in the appendix to the petition for writ of certiorari, pages xv-xvii and xviii-xxiii respectively.

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## JURISDICTION TO REVIEW

The decisions of the Court of Appeals to be reviewed were entered on December 18, 1974 (No. 74-3392) and January 17, 1975 (No. 74-2206).

The decision of the Court of Appeals in action No. 74-3392 entered on December 18, 1974 denied a petition for writ of mandamus and/or prohibition to review a discovery order entered by the district court on December 3, 1974. By order dated December 31, 1974, Mr. Justice Douglas stayed the provisions of the district court's order of December 3, 1974 pending further consideration. (A. 706). By order dated February 1, 1974 Mr. Justice Douglas stayed the provisions of the district court's order pending final disposition of a timely filed petition for writ of certiorari. (A. 723).

On January 27, 1975 the Court of Appeals entered an order staying issuance of mandate under its decision of January 17, 1975 in No. 74-2206 pending final disposition of a petition for writ of certiorari filed on or before February 17, 1975. (A. 721). On February 13, 1975, the Court of Appeals continued this

stay of mandate pending final disposition of a petition for writ of certiorari filed by February 28, 1975. (A. 724).

Pursuant to Rule 23(5) Supreme Court Rules, a single petition for writ of certiorari was submitted. This petition was filed February 15, 1975, and granted May 27, 1975. The jurisdiction of this Court rests on Title 28 United States Code section 1254(1)

---

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

**United States Constitution, Amendment IV:**

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

**28 United States Code Section 1651(a):**

"The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

**Federal Rules of Civil Procedure, Rule 26(b)(1):**

"Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to



the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of the persons having knowledge of any discoverable matter. It is no ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

**California State Statutes:**

While not directly at issue in this action, several California state statutes have frequently been cited below:

California Penal Code, sections 11105(b); 11120; 11122-11125; 1203.01; 2081.5; 3022; 3042; 3046.

California Government Code, sections 6254 (a), (c), (f), (k); 6255.

California Evidence Code, section 1040(b) (1), (2).

The text of these statutory provisions is included in the appendix to this Brief.

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## QUESTIONS PRESENTED

1. Whether Rule 26(b)(1), Federal Rules of Civil Procedure, extends to confidential state government documents a qualified privilege of non-disclosure

whereby their production for adversary inspection may be compelled only after the district court has examined them *in camera* and decided their utility in the pending action outweighs their confidentiality.

2. Whether this qualified privilege may be asserted by the state attorney general on behalf of his client who is a defendant and also the head of the state department which controls the documents where (a) the confidential nature of the documents is apparent; (b) the need for the documents in the pending action is not apparent, and (c) there are abundant alternative sources for the information for which the confidential documents might be sought.

3. Whether the compelled disclosure of confidential government documents for adversary inspection under the protective orders in this case, or under any protective order, is a permissible substitute for a qualified privilege of non-disclosure under Rule 26(b)(1), Federal Rules of Civil Procedure.

4. Whether the Court of Appeals erred in denying defendants' applications for mandamus inasmuch as the district court did not have the legal power to act or refuse to act as it did.

5. Whether the compelled production of confidential documents for adversary inspection under a court order which is not supported by probable cause to believe that the need for the documents in a pending action outweighs their confidentiality is an unreasonable search or seizure in violation of the Fourth Amendment to the United States Constitution.



## STATEMENT OF THE CASE

**A. Nature of the Action in the District Court:**

This is a civil rights class action, on behalf of all adult male felons in California state prisons or on parole (A. 369), for declaratory and mandatory injunctive relief to determine what process is due at parole proceedings and at prison disciplinary proceedings. Plaintiffs are state prisoners. Defendants are the chairman, members, and administrative officer of the California Adult Authority (the state parole board), and the California Director of Corrections.

The action began over two and one half years ago upon the filing of a complaint which is substantially couched in terms that broadly assert numerous prisoners' rights for the purpose of utilizing the liberality of the federal rules of civil discovery.[2] Since the filing of the complaint massive discovery has been demanded by plaintiffs and furnished by defendants albeit in large part under order of the district court.

This proceeding on certiorari relates to a crucial part of the discovery the district court has ordered defendants to furnish plaintiffs: the compelled, indiscriminate disclosure of confidential state government documents and personnel files of no apparent utility to plaintiffs' action.

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[2]Plaintiffs tacitly acknowledge this in their arguments on relevancy of the material they have demanded on discovery:

> "Accordingly, plaintiffs are obliged to present evidence concerning all of these various components of the parole system in order to sustain their burden of proof at trial; and defendants' objections to relevance must therefore be received in the contexts of these wide-ranging factual allegations." (A. 93-94.)

**B. The Complaint:**

The complaint (A. 8-50), filed November 15, 1972, and first amended on June 26, 1974 (A. 294), purports to describe facts and circumstances of particular prison disciplinary and parole proceedings between May 1960 and September 1972[3] which involved one or another of the seven named plaintiffs, and alleges that at each such proceeding a plaintiff's rights were violated, including alleged rights to an attorney, to access to the information relied on by the hearing panel, to present witnesses, and to confront and cross-examine witnesses. (A. 18-39).

The complaint by general and conclusionary allegations, expressed in colorful prisoners' rights rhetoric, then asserts that Adult Authority members are each biased and personally unqualified for their official tasks; that the information in correctional files upon which the defendants rely is unreliable; that inmates are incapable of advancing their own interests at hearings; and that insufficient time is devoted to hearings. (A. 39-43).

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[3]The proceedings specified in the complaint are: (A) *Parole Considering Proceedings: Jones*—March 1971 (A. 23), December 1971 (A. 24), May 1972 (A. 25); *Van Geldern*—February 1972 (A. 32-33), May 1972 (A. 33-34); *Lewis*—April 1972 (A. 20). (B) *Parole Rescission Proceedings: Jones*—October 1970 (A. 22-23), December 1971 (A. 24), February 1972 (A. 24-25); *Van Nort*—December 1970 (A. 27); *Murrin*—September 1972 (A. 35-36). (C) *Parole Revocation Proceedings: Gardner*—May 1960 (A. 29-30), December 1971 (A. 31); *Van Geldern—April* 1970 (A. 32); *Lewis*—December 1971 (A. 19-20); *Chatfield*—December 1971 (A. 38-39), January 1972 (A. 38-39). (D) *Prison Disciplinary Proceedings*: *Jones*—September 1970 (A. 22-23), February 1972 (A. 24-25); *Van Nort*—November 1970 (A. 26-27); *Murrin*—July 1972 (A. 35-36). Term fixing or refixing attended the above proceedings on consideration, rescission, or revocation of parole.



Plaintiffs demand a declaratory judgment that the enumerated procedures each violated the Constitution (A. 45-46), and a mandatory injunction requiring defendants to accord all state prisoners and parolees the following items at the following proceedings (A. 46-47):

1. Items demanded:

(a) Timely notice of all proceedings, the charges involved, of the evidence to be relied on, and a timely opportunity to review the correctional files;

(b) An opportunity to be heard, to present witnesses, and to cross-examine witnesses;

(c) Counsel at any hearing;

(d) Hearing before an unbiased panel or official, and opportunity to challenge any panel or official for cause;

(e) A verbatim record of the proceeding, and a written decision stating the reasons for decision and the evidence relied upon.

2. Proceedings at which the above items are demanded:

(a) Proceedings on revoking, suspending, or rescinding parole; proceedings on re-fixing sentence;

(b) Proceedings on fixing or refusing to fix terms;

(c) Proceedings on imposition of serious disciplinary sanctions.

**C. Defendants' Attempts for Dismissal of the Action:**

On December 22, 1972, defendants filed a motion to dismiss the action upon the grounds that the complaint failed to state a claim against defendants upon which relief could be granted. Rule 12(b), Federal Rules of Civil Procedure. This motion and supporting memorandum urged the equitable relief demanded by plaintiffs was inappropriate because proceedings on habeas corpus would afford plaintiffs a plain, speedy, and more adequate remedy at law; and that declaratory relief was unnecessary and inappropriate by reason of intervening changes in the law.[4]

Upon denial of the motion to dismiss on March 8, 1973, and denial of certification for interlocutory appeal [Rule 5, Federal Rules of Appellate Procedures; 28 USC section 1292 (b)], on April 12, 1973, defendants petitioned the Court of Appeals for a writ of mandamus. *Kerr, et al. v. Weigel, et al.*, No. 73-1761 (9th Cir.). The petition was denied on May 10, 1973. Defendant's petition for rehearing in the Court of Appeals in light of *Preiser v. Rodriguez*, 411 U.S. 475 (May 7, 1973) was denied on May 30, 1973.

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[4]The motion pointed out to the district court that the process due at parole revocation proceedings had been delineated in *Morrissey v. Brewer*, 408 U.S. 471 (1972); that due process at prison disciplinary proceedings had been delineated under *Clutchette v. Procunier*, 328 F.Supp. 767 (N.D. Cal.1972) [affirmed 497 F.2d 809 (9th Cir. 1974), opinion on denial of rehearing, 510 F.2d 613 (9th Cir. 1974), cert. granted *sub nom. Enomoto v. Clutchette*, No. 74-1194 (June 9, 1975)]; that due process at parole date rescission hearings had been delineated in *In re Prewitt*, 8 Cal.3d 470, 503 P.2d 1326 (1972) (applying *Morrissey* to such proceedings), and that the Court of Appeals had recently determined there is no right under due process to the parole consideration procedures for which plaintiffs contend, *Dorado v. Kerr*, 454 F.2d 892 (9th Cir. 1972).



**D. Procedures Relating to the Orders to Produce for Adversary Inspection the Confidential Contents of Inmate Files:**

By letter dated November 5, 1973, plaintiffs requested defendants to stipulate to the production of every twentieth inmate file in institutions of the California Department of Corrections. (A. 234-235). This would involve the files of about 1,000 inmates. By letter dated November 8, 1973 defendants declined to stipulate.[5]

On May 15, 1974 plaintiffs filed a motion for an order requiring, in part, that "plaintiffs' counsel be permitted to inspect at random every twentieth file of inmates in the California prison system" (A. 232).[6] Defendants opposed this demand on several grounds including specified governmental requirements of confidentiality, the interest of the other inmates against an unwarranted invasion of their privacy (A. 257-258) and on Fourth Amendment grounds (A. 259).

---

[5]At the time this request was made by plaintiffs, defendants were about to file their response (A. 57) to plaintiffs' June 21, 1973 request for documents (A.51). Item No. 1 of this request demanded the production of the correctional files of each of the named plaintiffs.

[6]This motion also sought an order requiring that members of the California Bar be permitted to attend in groups of three and to take notes at parole granting hearings, and that all parole granting hearings be tape-recorded up until the time of commencement of trial. (A. 232). The matter of attendance of attorneys at parole granting hearings was resolved by mutual agreement of counsel (A. 288; petition of writ of certiorari, appendix, page xxix), as a result of which 24 attorneys designated by plaintiffs' counsel attended and took notes at a total of 160 hearings. (A. 602, 676).

The magistrate recommended denial of plaintiffs' request to record parole consideration hearings (petition for certiorari, appendix, pages xxxviii-xxxix). On plaintiff's request for review of this decision (A. 276) the district court on August 12, 1974 ordered all such hearings at two state prisons to be recorded by designees of counsel for plaintiffs (petition for certiorari, appendix, pages

The motion was argued and submitted to a magistrate[7] who, on June 11, 1974, filed findings and recommendations that the files of inmates be produced under a protective order restricting examination to attorneys for plaintiffs and their use only in connection with this action (petition for certiorari, appendix, pages xxxix-xl).

With their notice of intent to seek review of the magistrate's decision, defendants filed a statement of objections (A. 273), followed by a formal request for review by the district judge (A. 287).[8] On August 12, 1974 the district court filed its order incorporating and affirming the magistrate's decision with modifications, including a provision that plaintiffs' counsel may inspect the files of any 200 inmates whose parole consideration hearings are tape-recorded (see footnote 5 *supra)* and who consent to such inspection (petition for certiorari, appendix, pages xxxi-xxxiii).

By letter dated September 27, 1974, plaintiffs' counsel furnished their first designation of inmates whose

xxx-xxxi). Through November 1974 approximately 1200 such hearings were recorded (A. 602), despite repeated motions by defendants to terminate the recordings. The last such denial of a motion to terminate the recordings appears in the district court's order filed December 3, 1974 (A. 649). Defendants' petition for mandamus in the Court of Appeal in No. 74-3392 (A. 651) sought review of this matter (A. 652-653, 674-677) as well as of the compelled production of the contents of inmate files. However, plaintiffs' letter to the Court of Appeal in opposition to this petition sought to render this question moot by announcing for the first time that plaintiffs were abandoning the recordings (A. 696).

[7]The district court ordered all discovery motions to be heard first by a magistrate.

[8]Plaintiffs also requested review of the magistrate to the extent his decision would deny them recordings of parole consideration proceedings. See footnote 5 *supra*, page 11.



files were to be examined under the order (A. 529-531).[9] The files of twenty-two inmates within the terms of the order were furnished, and inspected by plaintiffs' counsel on October 9, 11, and 15, 1974 (A. 497-498). However, as a preliminary matter, confidential documents were withheld by the Department of Corrections from some of these files. These documents included reports from confidential informers, crime partner information, sensitive clinical data, investigative reports accompanying visitor requests, and confidential communications from judges and district attorneys. Each document withheld was identified in writing as was the reason for withholding it, and plaintiffs' attorneys were furnished with the writing. The texts of these notices are printed at A. 502-524.

On October 9, 1974, the first day of inspection of the files, counsel for plaintiffs and defendants had a telephone conversation about the withheld documents (A. 539-540, 447-448, 460-461). Counsel for defendants stated the documents were withheld because they were confidential; that the documents, for the most part, were unrelated to plaintiffs' case; and that if particular withheld documents appeared to counsel to be relevant in this action, counsel should so inform counsel for defendants who would then request the Department of Corrections to re-evaluate its decision in light of counsel's expressed need for the documents. (A. 539-540).

[9]Twenty-eight inmates are listed, six of whom did not come within the provisions of the order limiting inspection to inmates whose hearings had been recorded and who had consented to record inspection.

Counsel for plaintiffs continued their inspection of the files.[10] By letter dated October 15, 1974, counsel for defendants again emphasized that the documents were withheld as a preliminary matter and reiterated to counsel for plaintiffs that if they wished to inspect any of the confidential documents withheld, they should express some specific need for them in the pending action whereupon the withholding of the documents would be re-evaluated in the light of such need. (A. 525-528). This letter, as well as the telephone conversation of October 9, 1974, sought negotiations between counsel and then, if necessary, presentation of the documents to the district court for an *in camera* inspection and balancing of the interests in confidentiality against plaintiffs' need for the documents in the action.

Rejecting this procedure, plaintiffs filed on October 19, 1974, their motion for enforcement, clarification, and sanctions, which requested that the files be furnished intact and asserted that defendants violated the district court's order of August 12, 1974, by withholding the confidential documents from production (A. 446-449). The motion also requested that plaintiffs be allowed to make photocopies of any or all contents[11] of the files (A. 446, 452), and that inspection

[10]On October 9, 1974 five files were inspected. Two were inspected on October 11, 1974 and sixteen files (one of which had also been inspected on October 9, 1974) were inspected on October 15, 1974). (A. 497-499).

[11]The language "any or all" contents does not appear in the motion, but does appear in plaintiffs' proposed order (not printed in the Single Appendix) and in the district court's order of December 3, 1974 (A. 649). (Pet. for Certiorari, Appendix, p. xxvii).



not be limited to files of inmates whose parole consideration proceedings had been recorded (A. 453-455). Defendants filed a detailed opposition to this motion (A. 470-541) to which plaintiffs filed a response (A. 542-560), followed by defendants' reply (A. 561-568).

When the matter was heard on October 31, 1974, the district court made it clear that the preliminary withholding of the documents was regarded as a violation of the discovery order and threatened defendants, and counsel for defendants, with contempt proceedings if this or any other violation out of an order occurred.[12] The district court announced that a forthcoming written order would provide that (1) the inmate files subject to inspection include the files of inmates whose parole consideration proceedings were not recorded; (2) the contents of the files to be produced for inspection must include all material and all correctional files on the inmate designated; (3) plaintiffs could move for modification of the order of August 12, 1974, to permit photocopying the contents of the files inspected, and (4) plaintiffs' counsel could have the assistance of two certified law students in inspecting the files.

Plaintiffs filed on November 11, 1974, their motion for modification of the order of August 12, 1974 (A.

[12]All discovery motions in this action have been submitted on the basis of papers and files in the action and argument of counsel at appearances on the motions. The hearings before the court and before the magistrate have not involved the presentation of testimony. Accordingly, counsel have agreed that transcripts of the hearings need not be included in the Single Appendix.

Respective counsel's versions of the district court's threats of contempt during the above proceeding agree. (Pet. for Certiorari, p. 11; Plaintiffs' Memorandum in Opposition to Petitioners' Application for Stay Order of this Court, p. 4:12-21).

569). Defendants' written opposition included a countermotion for modification of the order insofar as it would require disclosure of confidential documents on demand by plaintiffs' counsel. (A. 599-600). This countermotion specified details of a suggested procedure to provide for negotiations between counsel, and then for an *in camera* inspection and a judicial balancing of respective interests prior to any compelled disclosure for adversary inspection of documents designated as confidential in inmate files. (A. 599-600).

The motions and countermotions were argued and submitted on November 21, 1974, whereupon the district judge dictated in open court the text of the order signed and filed December 3, 1974 (A. 647-650) (Pet. for Certiorari, Appendix, pp. xxv-xxviii). This written order includes the district court's determinations of October 31, 1974 and November 21, 1974, and incorporates by reference the order of August 12, 1974, which, in turn, incorporates by reference the magistrate's findings and recommendations dated June 11, 1974.

Defendants filed their petition for mandamus and request for immediate stay in the Court of Appeals on December 13, 1974 (A. 651-691). The immediate stay was granted on the same date (A. 698). Plaintiffs submitted to the Court of Appeals a response in letter form on December 16, 1974 (A. 692-697), and on December 18, 1974, the Court of Appeals summarily denied the petition (A. 699).[13]

[13]By letter to the Court of Appeals dated December 19, 1974, defendants responded to plaintiffs' letter point by point (A. 700-705). Defendants at this time did not know the Court of Appeals had ruled on the petition. It was on December 26, 1974, that defendants first received notice of the Court of Appeals order denying the petition.



By letters dated December 27, 1974, plaintiffs' "proposed" detailed arrangements for their inspection of files under the district court's order of December 3, 1974, and furnished a list of ten inmates whose files were to be produced for inspection no later than January 3, 1975.

Upon defendants' application, on December 31, 1974, Mr. Justice Douglas signed an order staying the district court's order of December 3, 1974, insofar as it required disclosure of material in the inmate files. (A. 706). By Order dated February 1, 1975, Mr. Justice Douglas continued this stay pending the timely filing and disposition of this petition for writ of certiorari (A. 723).

**E. Proceedings Relating to the Compelled Production of the Personnel Files and Departmental Memoranda, etc.:**

On June 21, 1973, plaintiffs filed a request for the massive production of twenty-two broad categories of "documents." (A. 51).[14] Defendants' response agreed to furnish much of the material requested, and specified reasons, including various California statutes which make the material privileged, for declining to

[14]The request defined the term "document" or "documents" to include "all correspondence, memoranda, or both other records or writings of any kind or copies thereof where the originals are not available, including, without limitation, files, books, pamphlets, periodicals, letters, reports, charts, diagrams, records, drafts, studies, working papers, notes, papers, ledgers, journals, or other books of account, minutes of meetings (including without limitation every sort of staff meeting held by the California Adult Authority or the California Department of Corrections) diaries and personal inter-office memoranda" (A. 51).

furnish some documents and for objecting to some of plaintiffs' requests. (A. 57-75).

Nevertheless, plaintiffs on March 11, 1974, filed a motion for an order compelling discovery, which demanded production of every document in every category of the request for documents. (A. 76-146).[15] Defendants again responded in detail to oppose this motion (A. 147-196), and plaintiffs' replied to defendants' response (A. 197-215). Defendants' opposition is replete with assertions of irrelevancy of the documents demanded, as well as assertions of privilege or confidentiality as specific as the scope of the sweeping demands would reasonably allow (A. 147, 173-179, 180, 181-182, 186-187, 188-91).

On April 24, 1974, the magistrate filed his recommendations that "with respect to plaintiffs' motion for production of documents the same be granted as to each and every item." (Petition for certiorari, appendix, page xix).

Defendants duly noted their intent to review the magistrate's decision (A. 217), and on May 6, 1974 filed their formal request for such review (A. 220-

[15]This motion, and defendants' response in opposition to it, related also to plaintiffs' first set of interrogatories (A. 323-333), which are not directly at issue in these proceedings on certiorari. However, the information furnished under questions Nos. 1 and 2 of the interrogatories (A. 324-325) reduces to a minimum any of plaintiffs' need for the personnel files demanded in document Request No. 7 (A. 52-53). The district court sustained defendants' objections to parts B, F, G, H, I, and K of Question Nos. 1 and 2 of the interrogatories, but nevertheless compelled production of the personnel files and refused to inspect these files *in-camera* prior to such production for adversary inspection (district court's order of June 20, 1974, petition for certiorari, appendix, pages xvi-xvii).



231). Defendants asserted that *Preiser v. Rodriguez,* 411 U.S. 475 (1973), and *Clutchette v. Procunier,* 497 F.2d 809 (9th Cir. 1974),[16] cast doubt on the district court's jurisdiction to entertain a federal civil rights suit based on due process challenges to state term-fixing parole granting hearings (A. 223-225)[17] and that the documents requested in categories 7, 14, 15, 18, 20, 21, and 22 of the request for documents (A. 52-56) were of recognized confidentiality and entitled to at least a qualified privilege whereby their disclosure should not be ordered unless a compelling need for them had been asserted and then only after an *in-camera* balancing of the competing interests (A. 225-229).[18]

The matter was argued and submitted to the district judge who, on June 20, 1974, filed an order adopting the magistrate's findings and recommendations as the order of the court, except as modified. With respect to the documents request, the court adopted the magistrate's recommendations that *every* document be produced, and the only modification was to limit to counsel for plaintiffs, and no more than two investigators designated by such counsel, inspection of the inmate files of the named plaintiffs, and of the personnel files of defendants, hearing officers, and executive officers (petition for certiorari, appendix, page xvi).

[16]Opinion on denial of re-hearing, 510 F.2d 613 (9th Cir. 1974), cert. granted *sub nom Enomoto v. Clutchette,* No. 74-1194 (June 9, 1975).

[17]This question is now before this Court in *Weinstein v. Bradford,* No. 74-1287, certiorari granted June 2, 1975.

[18]Plaintiffs filed opposition on June 5, 1974 (A. 261-272).

The court's order expressly denied defendants' request for an *in-camera* inspection of the personnel files as well as defendants' request for a stay of the requirement of their disclosure pending disposition of a petition for mandamus filed within five days of the order (petition for certiorari, appendix, pages xvi-xvii).

On June 26, 1974, defendants petitioned the Court of Appeals for a writ of mandamus and/or prohibition, and applied for a stay of the district court's order insofar as it compelled the production of documents in categories 7, 14, 15, 18, 20, 21 and 22 of plaintiffs' request for documents. (A. 298-333). Supplemental authorities were furnished the Court of Appeals by letters dated July 16, 1974 [*Wolff v. McDonald,* 418 U.S. 539 (1974)], and July 25, 1974 [*United States v. Nixon,* 418 U.S. 683 (1974)], and on August 8, 1974 defendants filed a supplemental application for stay (A. 363-367). The Court of Appeals, on August 15, 1974 ordered that an answer be filed, and stayed the district court's order of June 20, 1974 to the extent it required production of any documents to which defendants had raised an objection on grounds of confidentiality. (A. 368). Plaintiffs' answer was filed August 30, 1974 (A. 371-423), and defendants reply was filed on September 4, 1974 (A. 424-444).

The matter was argued and submitted to the Court of Appeals on November 14, 1974 and on January 17, 1975 the court rendered its opinion denying the petition for mandamus and vacating the stay (A. 707;



petition for certiorari, appendix, pages i-xiv; *Kerr, et al. v. USDC, et al.,* 511 F.2d 192 (9th Cir. 1975).) The Court of Appeals stayed issuance of mandate under its decision pending disposition of these proceedings. (A. 721, 724).

**F. Other Discovery Afforded Plaintiffs:**

Plaintiffs have demanded and have been furnished other discovery in massive proportions:

1. *Interrogatories:* Plaintiffs have propounded and been furnished answers and supplemental answers to three sets of interrogatories which have asked hundreds of questions of the defendants.

2. *Request for Admissions:* Plaintiffs have propounded and been furnished responses to two sets of requests for admissions totaling well over 200 such requests.

3. *Request for Documents:* Plaintiffs have propounded numerous requests for documents seeking production of all documents in dozens of categories.

4. *Recordings:* As of the time the petition for writ of certiorari was filed, plaintiffs had recorded approximately 1,200 parole consideration hearings. See footnote 6 above, pages 11-12. In March 1975 the Adult Authority instituted significant changes in the parole consideration procedure. On this basis plaintiffs requested and the district court ordered further recordings be made. As a result, several hundred additional parole consideration hearings were recorded by plaintiffs during the months of April and May 1975.

5. *Depositions:* As of the time the petition for writ of certiorari was filed plaintiffs had taken depositions, totaling over 1,400 pages, of nine members of the Adult Authority, the administrative officer of the Adult Authority, of three Adult Authority hearing representatives, of a psychiatrist employed by the Department of Corrections, of a correctional counselor employed by the Department of Corrections, and of two research supervisors employed by the Department of Corrections. The depositions of all these persons included many questions of their backgrounds, education, and work experience and the depositions of the Adult Authority members and hearing representatives focused on the parole consideration process.

On the basis of institution of the new parole considerations procedures, plaintiffs requested, and the district court ordered, additional depositions of eight persons: the secretary of the California Health and Welfare Agency (of which the Department of Corrections and the Adult Authority are parts); the new chairman of the Adult Authority (the defendant Procunier), and of six members or hearing representatives of the Adult Authority. These depositions were taken the months of April and May 1975 and will total about 400 pages.

6. *Visits and Observations:* Many persons are available to testify for plaintiffs with respect to the nature of the parole consideration process and of the interests at stake. Twenty-four attorneys designated by plaintiffs, including plaintiffs' attorneys of record, have attended and taken notes at 160 parole considera-



tion hearings. Many dozens of lay persons designated by plaintiffs have attended these proceedings as operators of recording devices at the total of approximately 1,500 parole consideration hearings recorded. All California state prison inmates, members of plaintiffs' class, have participated in parole consideration hearings and counsel for plaintiffs as well as designees of such counsel may interview these members of the class under separate orders of the district court not here at issue. In addition, plaintiffs may call members of the parole board, hearing representatives, and numerous correctional personnel who have personal knowledge of these proceedings.

7. *Inmate Files:* Under order of the district court herein to be reviewed, plaintiffs are entitled to examine the contents of the correctional files of any 200 inmates designated by them. The number of items which are highly confidential and entitled to protection as asserted herein is small when compared with the total contents of the files. Plaintiffs will be authorized to examine this large portion of the contents of inmate files with respect to which a qualified privilege is not asserted and this will be done pursuant to recently established regulations of the Director of Corrections the text of which is printed in the Single Appendix. (A. 604-646).

Indeed, by letter dated June 4, 1975, counsel for plaintiffs have requested the opportunity to inspect inmate files under these procedures acknowledging that the Department of Corrections by reason of the certiorari proceeding may withhold from inspection

any documents which are considered to be confidential. With respect to the documents to be furnished, counsel acknowledged in the letter that "we consider ourselves still bound by the provisions in Judge Weigel's orders limiting our use of these documents to the *Van Geldern* case." The text of counsel's letter is printed in the appendix to this brief, pages i-ii. By letter dated June 10, 1975, defendants agreed to permit such inspection under certain conditions specified in the letter and the text of this document is printed in the appendix to this brief at pages iii-v.

**G. Present Status of the Action in the District Court:**

Almost immediately after certiorari was granted, counsel for plaintiffs drafted and sought leave to file a second amended complaint, insisted on the prompt commencement of trial, stated that trial could proceed without the documents involved in the certiorari proceedings, and stipulated orally that plaintiffs would waive the prejudice caused by withholding the documents. Defendants opposed plaintiffs' motions for leave to file the second amended complaint, and moved for an order staying the commencement of trial for numerous reasons including the pendency of the instant proceedings on certiorari, and the pendency in this Court of *Weinstein v. Bradford,* No. 74-1287 (whether due process at state parole consideration hearings may be litigated under 42 USC §1983), and *Enomoto v. Clutchette,* No. 74-1194 (whether the procedures comporting to due process at disciplinary hearings will be prescribed by lower federal courts or by state administrators).



Plaintiffs opposed defendants' motion for stay and insisted that trial begin promptly. In their written opposition plaintiffs stated:

> "Of the two parties to the present case, it is only plaintiffs who could be prejudiced by proceeding to trial, since they have been denied access to documents important to proving their case. Yet, (because of the prejudice that would come to them from not proceeding) they are willing and desire to proceed to trial without the benefit of the documents that would have been discovered pursuant to the order appealed in *Kerr*. If any interest of the defendants is involved at all, it is aided by proceeding without the plaintiffs having obtained complete discovery."

The motions were heard in the district court on June 25, 1975 whereupon the judge ruled from the bench granting plaintiffs' motion to file the second amended complaint, denied defendants' motion to stay trial, and set commencement of trial for September 8, 1975.

The second amended complaint adds new defendants, individually and as successors in interest to some of the original defendants, but retains all the original defendants in their capacities as individuals, and as officials, or *former* officials. The claims in the new complaint are confined to parole consideration and term-fixing proceedings, and to prison disciplinary proceedings. The new complaint asserts no claims for due process at parole rescission or parole revocation proceedings.

New claims are asserted in the second amended complaint in that plaintiffs for the first time seek: a

declaratory judgment, implemented by broad injunctive relief, that the California indeterminate sentence law is invalidly administered under the United States Constitution, and under the California Constitution; an injunction compelling defendants and their agents to manage state treasury funds to establish, implement, and monitor new procedures comporting to due process; appointment of a magistrate or special master to supervise the establishment and implementation of such procedures; and payment of plaintiffs' costs and attorney and witness fees.

On July 8, 1975, by reason of the new allegations in the second amended complaint, defendants filed notice of the requirement of a three judge district court under Title 28, USC section 2281. Defendants have also given notice, under local court rules, that the instant case is related to another case pending in the district which also seeks to enjoin, on constitutional grounds, the California indeterminate sentence law.

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## SUMMARY OF ARGUMENT

The district court's discovery orders are not only indiscriminate (they require production of all personnel records of all parole board members and hearing officers and all contents of all correctional files of any 200 inmates designated by plaintiffs), the orders also preclude any attempts by defendants to segregate particular confidential documents for an informed determination by the district court of whether their confidentiality is outweighed by any utility the documents may have to the plaintiffs in their action below.



Under Rule 26(b)(1), Federal Rules of Civil Procedure, the federal courts recognize a qualified privilege to protect confidential government documents from unnecessary disclosure. The qualification of the privilege is that a confidential document may be ordered disclosed if its confidentiality is outweighed by the utility of the document to the proponent of its discovery in the pending action. This qualified privilege extends to confidential state government documents. The personnel files of members and hearing officers of a state parole board, as well as specified portions of the contents of correctional files of state prisoners are of confidential nature. Indeed, by virtue of the protective provisions, even though inadequate, in the discovery orders, the magistrate and the judges below recognized that these categories of documents are confidential.

These categories of documents are of no apparent utility to the plaintiffs in this civil rights class action brought by state prisoners to determine what process is due at administrative proceedings concerning parole or discipline. Plaintiffs have been furnished massive discovery on the nature of these proceedings and of the interests they involve.

Under the circumstances of this case it was proper for counsel, the attorney general, to assert the qualified privilege. First, unlike an absolute privilege, the assertion of a qualified privilege does not call for abdication of judicial control over the evidence, but seeks an affirmative exercise of judicial control. Second, as the confidential nature of the documents is

apparent and was recognized by the judges below, a formal writing from the head of the department which controls the documents was not necessary. Third, in asserting the qualified privilege, the attorney general acted on behalf of parties to the action who were, in fact, the heads of the departments which control the documents ordered produced. Fourth, with respect to the confidential contents of inmate files, a more particularized and formal assertion of confidentiality is impossible until the files to be produced are designated by plaintiffs. Accordingly, the reasons heretofore relied on for requiring formal and personal assertion of privilege are absent.

The Fourth Amendment insures that reasonable expectations of privacy will be protected. The primary means by which such interests are protected is the prior informed determination of a judicial officer that the disclosure sought is not unreasonable. In considering the motions to compel production, the district court abdicated its responsibility to make such a determination. As the resulting orders issued in derogation of the limitations inherent in the Fourth Amendment, they must be set aside.

The compelled production of confidential documents for adversary inspection is no less a court ordered search under a discovery order than under a search warrant. Such an order, and the search required by it, are invalid under the Fourth Amendment if they are unreasonable. It is not reasonable to jeopardize the confidentiality of documents by compelling their production for adversary inspection where confidentiality



is apparent and recognized; the utility of the documents to the adversary is not apparent; and where an abundance of alternate information has been furnished.

The qualified privilege of non-disclosure of confidential documents, and the procedures herein requested to implement it, are necessary to a reasonable and valid order.

The qualified privilege should not be viewed by the courts with hostility as an impediment to disclosure of the truth in pending litigation. Unlike an absolute privilege, the qualified privilege does not block information from the court, but only from an adversary, and then only where legitimate public policy favoring confidentiality outweighs the litigant's need for the information in the pending action. The compelled, indiscriminate production of the documents for adversary inspection will not enhance the court's search for the truth. Even if the contents of the documents are highly relevant and material to the subject matter of the action (in which case the documents would probably be ordered produced anyway, after an *in-camera* inspection and balancing), there is no requirement that plaintiffs furnish them to the court. Indeed, to the extent that documents would tend to undermine plaintiffs' allegations, it is likely counsel would not volunteer them for the court's consideration.

The compelled disclosure of confidential government documents under a protective order is neither the equivalent of, nor an adequate substitute for, a qual-

ified privilege of non-disclosure, and is not the equivalant of an informed and particularized exercise of judicial discretion.[19] Neither the magistrate nor the district judge examined any of the documents prior to compelling their disclosure for adversary inspection.

Relief from the requirements of the district court's discovery order is available in no other court, and review on appeal after judgment in the district court will be inadequate to cure the irreparable harm which will result from adversary inspection of the confidential documents.

The standard for when mandamus should be granted to review interlocutory discovery orders differs among the courts of appeals. The Court of Appeals in this case relied on the strictest standard. Nevertheless, even under such a standard, mandamus should have been issued. There is a need, however, to delineate uniform standards for when mandamus should be granted to review such orders, and the need is especially great in actions initiated by state prisoners against state officials where discovery is easily abused.

[19]The protective provisions are illusory and inadequate. Although the protective orders limit inspection of the actual documents, the use of copies is less limited, and discussion of their contents is not limited. Use of the documents is limited only by a vague standard: to the extent necessary to the conduct of this action. The orders do not specify what measures must be taken by counsel (there are presently 7 counsel of record for plaintiffs, from at least 4 different law firms) or their investigators to assure compliance with the protective provisions, nor are these provisions for the ultimate disposition of copies, or copies of copies, which counsel may make of the documents. The risk of irreparable harm from further disclosure of the documents or their contents, through mistake, inadvertence, or otherwise, will continue beyond the termination of this litigation.



To the extent the term "privilege" in Rule 26(b)(1) takes its meaning from the law of evidence, section 501 of the Federal Rules of Evidence can be expected to generate divergent views concerning the discovery of confidential government documents. This circumstance also increases the need for advisory mandamus where, as here, the problem is a recurring one in the trial court.

The orders of the district court, as well as the opinion of the Court of Appeals, continue in effect, stayed only by these proceedings. The questions raised, moreover, are of exceptional significance in this action, and in other civil rights actions brought by prisoners in the federal courts in California and elsewhere. *See Enomoto v. United States District Court*, No. A-732, petition for certiorari filed May 28, 1975.

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## ARGUMENT

### I

### THE DECISIONS BELOW CONTRAVENE RULE 26 AND UNREASONABLY JEOPARDIZE VITAL INTERESTS BY DISREGARDING THIS PARAMOUNT LIMITATION OF THE SCOPE OF FEDERAL CIVIL DISCOVERY.

The district court knew that the state government documents which it ordered indiscriminately disclosed were confidential in nature. The court knew that the heads of the departments having control over the documents, defendants, vigorously opposed disclosure of the documents. The court further knew that defendants' assertions of confidentiality were based on important interests recognized in both state and federal law. The district court did not know of what

use the documents would be to plaintiffs because none was offered by plaintiffs beyond mere conjecture and because the court refused to examine the documents.

The record before the district court, and before the Court of Appeals, shows defendants in fact objected to the production of documents whose apparent confidentiality clearly outweighed any apparent need of plaintiffs for them. Accordingly the documents were privileged from discovery under Rule 26(b)(1).

Plaintiffs could have volunteered, or the court could have sought from plaintiffs, some specification of need, beyond mere conjecture, for the documents in this action. This was not done. The balance might have changed, had the court examined the documents, or any of them, and reasonably determined that the assertions of confidentiality were not well taken. This was not done, although defendants offered to furnish the documents for this purpose.

In *United States v. Reynolds,* 395 U.S. 1, 11 (1953), this Court stated that the showing of necessity by the proponent of discovery will determine how far the court should probe in satisfying itself that the occasion for invoking privilege is appropriate. Under this view, the stronger the necessity for the document, the deeper should be the probe into whether privilege is appropriate—the deepest probe being an *in camera* inspection. A necessary corollary is that even where a strong showing of necessity is made, disclosure to an adversary of material known to be of a confidential nature should not be compelled without a prior *in camera* inspection.



The compelled disclosure in this case without any *in camera* inspection, upon plaintiffs' most dubious showing of necessity, contravened Rule 26(b)(1).

**A. The Decisions in Fact Compel the Disclosure of Confidential Matter for Adversary Inspection:**

Through counsel, defendants asserted that some documents encompassed by plaintiffs' sweeping demands were privileged and protected from discovery in this action because they were confidential to a degree which outweighs any apparent need plaintiffs may have for them to advance their claims. Defendants specified the interests upon which their assertions of confidentiality are founded.

**1. The Confidentiality of Inmate Files:**

The confidentiality of parts of the contents of inmate files is founded on interests in institutional security; protection of informants from inside and from outside the prisons; staff security; avoiding danger to the safety of other persons; preventing impairment of the adjustment or rehabilitation of the inmate; encouraging candor and complete disclosure of information concerning inmates from public officers, and private citizens; and requirements of confidentiality under state statutes. (A. 173-177, 226-228, 255-259, 289-293). Several authorities, state and federal, recognizing the validity of these interests as a basis for confidentiality, were cited. (Ibid). Defendants also asserted that the inmates have an interest against an unwarranted invasion of their privacy. (A. 257).

Defendants urged that, as plaintiffs' demands furnished no cause to believe they needed the documents and offered no specification of the information sought or of particular documents to be disclosed, compelled disclosure would violate the Fourth Amendment. (A. 259). Where it was possible to do so, defendants furnished lists of particular documents which were highly confidential, and the reasons they were confidential. (A. 502-524).

Defendants repeatedly requested that any disclosure of these confidential materials for adversary inspection be preceded by negotiations between counsel and an *in-camera* inspection as necessary. (A. 176-177, 226-229, 257-258, 525-526). Finally, defendants proposed a detailed, reasonable procedure for doing this. (A. 525-526, 599-600).

**2. The Confidentiality of Personnel Files:**

The confidentiality of the contents of the personnel files is founded on interests against unwarranted invasions of privacy. These interests are recognized under state law as rising to the level of privilege, California Government Code, section 6254(c)[20] (A. 60-61, 181-182, 225-229). An *in-camera* inspection of these documents was requested by defendants (A. 225-229) and denied (USDC Order of June 20, 1974; Petition for Certiorari, Appendix, pages xvi-xvii).

**3. The Confidentiality of the Intra-Governmental Documents:**

The confidentiality of the numerous categories of memoranda, correspondence, etc. is founded on public,

[20]The text of this statute is printed in the appendix to this Brief, pp. xii.



governmental, and departmental interests in a free exchange of ideas, recommendations, opinions, etc., with candor, during the course of deliberation and considerations of policy making. (A. 177-179, 186-187, 188-191, 228-229). Specific federal authority recognizing these interests as a valid basis for confidentiality was furnished the district court. (Ibid). An *in-camera* inspection was requested. (A. 225-229).

**4. The District Court's Disposition of the Matter:**

The district court gave no reasons for its decisions to indiscriminately compel the production of all the contents of all the files of any 200 inmates designated by plaintiffs, as well as the production of the entire contents of the personnel files, and "each and every" document requested from the numerous categories of memoranda, correspondence, etc. However, we do know that a basis for the decisions was *not* rejection by the court of the confidential nature of the documents. The protective orders recommended by the magistrate, and included in the district court's orders, acknowledge that the contents of inmate files, and of the personnel files, are to some degree confidential.

Although recognizing the interests, the district court nevertheless refused to exercise informed consideration by examining the documents. Defendants' repeated good faith requests for such a judicial review were brushed aside in favor of indiscriminate disclosure under illusory protective orders.

**5. The Court of Appeals' Disposition of the Assertions:**

**a. The Personnel Files, and Memoranda, etc.:**

The Court of Appeals opinion, dealing with the personnel files and departmental memoranda, relied on *United States v. Reynolds,* 345 U.S. 1 (1953), and declined to reach the question of whether the common law governmental privilege covered these documents, finding that the privilege was not formally asserted and delineated by the department head having control over the matter (A. 717-718):

> "In the civil rights suit, petitioners' counsel merely raised a blanket objection covering any and all documents in request numbers 7, 14, 16, 18, 20, 21, and 22. Formally claiming a privilege should involve specifying which documents or *class of documents* are privileged and for what reasons, *especially where the nature of the requested documents does not reveal an obviously privileged matter.*" (Emphasis added). (A. 719).

The Court of Appeal's reference to the common law governmental privilege cited *Committee For Nuclear Responsibility, Inc. v. Seaborg,* 463 F.2d 788, 792-795 (D.C. Cir. 1971). *Seaborg,* in turn, relied on *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 324 (D.C. 1966), affirmed on the basis of the District Court opinion, 384 F.2d 979 (D.C. Cir. 1967), cert. denied 389 U.S. 952 (1967), for the proposition that:

> "The government may still have an interest [short of military or diplomatic secrets], however, in avoiding disclosure of documents which reflect intra-executive advisory opinions and recommendations whose confidentiality contributes substantially to the effectiveness of government decision-making process." 463 F.2d 792.



The *Zeiss* opinion is more expansive:

> "What is decided, and all that needs to be decided, is that, as documents intergral to an appropriate exercise of the executive's decisional and policy-making functions, they are immune from the disclosure the claimants seek. 40 F.R.D. at 324.
>
> * * *
>
> "In striking the balance in favor of nondisclosure of intragovernmental advisory and deliberative communications, the privilege subserves a preponderating policy of frank expression and discussion among those upon when rests the responsibility for making the determinations that enable government to operate[16] [footnote omitted], and thus, achieves an objective akin to those attained by other privileges more ancient and commonplace in character.[17]"
>
> "[Fn.][17]"Essentially similar policies of uninhibited communication underlie such frequently used commonlaw privileges as those subserving the attorney-client and husband-wife relationships [Citation omitted]." 40 F.R.D. at 324-325.

*Zeiss* would apply this reasoning to exchanges among staff, civil servants, executive assistants, or between agencies. 40 F.R.D. at 324, footnote 16 at 325.

The very language used by plaintiffs to describe the documents requested also identified them as obviously within this privilege. A formal delineation of the privilege by defendants would not have served to further inform the court of the reasons the documents

were confidential. Indeed, that the documents were either irrelevant, or within the privilege is confirmed by plaintiffs' answer to the petition for mandate, where in urging the documents are "highly relevant to the subject matter of the litigation" (A. 376), plaintiffs summarized their demands as follows:

> "The documents whose production petitioners have resisted in this Court are (1) the personnel files of defendants Adult Authority members (respondent's Requests No. 7); (2) reports submitted by Adult Authority members and hearing representatives (i.d., No. 14); (3) written statements by members or hearing representatives taking a position on Federal or State legislation (i.d., No. 15); (4) written proposals for changing various aspects of the Adult Authority (i.d., No. 18); (5) memoranda written by defendant Henry Kerr, who at the time the complaint was filed was Chairman of the Adult Authority (i.d., No. 20); (6) documents which pertain to Adult Authority Policy Statements and Resolutions (i.d., No. 21); and (7) documents which concern the Adult Authority's adoption of new policies, procedures, criteria (i.d., No. 22)." (A. 377-378).

The confidential nature of all the documents thus described in plaintiffs' summary is patent. *Zeiss, supra.* The documents encompassed by the full text of plaintiffs' demands (A. 52-56), but not by this summary of relevant documents, were irrelevant, as well as also confidential.



**b. The Inmate Files:**

While the personnel files decision was pending in the Court of Appeals,[21] the mandamus proceedings concerning the district court's December 3, 1974 order (A. 647-650) were initiated (A. 651) and summarily rejected without opinion (A. 669), even though the district court's order, by its terms, precluded any attempt by defendants to comply with *Reynolds*:

> "All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection.
>
> "IT IS FURTHER ORDERED that all material previously removed or withheld by defendants from files already requested by plaintiffs shall be made available to plaintiffs' counsel for inspection within ten days.
>
> * * *
>
> "IT IS FURTHER ORDERED in reference to the Order of this Court dated August 12, 1974 [Petition for Certiorari, Appendix, pp. xxix-xxxiii], that:
>
> 1. Defendants shall make available to plaintiffs, upon plaintiffs' request, the central file of any inmate within the California Prison System, whether or not hearings have been tape-recorded for such inmate, up to a maximum of 200 such files. Files previously made available shall be counted toward the maximum." (A. 648-649).

[21] The matter was argued and submitted on November 14, 1974 (A. 6), and decided January 17, 1975 (A. 707).

The material previously removed from the files was identified in the lists made at the time of removal and furnished counsel. (A. 502-524).[22] These lists were furnished to the district court as appendix A of Defendants' Opposition to Plaintiffs' Motion for Enforcement, Clarification and Sanctions, filed October 29, 1974 (A. 470-541), and were furnished to the Court of Appeals as Appendix M of the Petition for Writ of Mandamus, filed December 13, 1974. (A. 651, 690). The confidential nature of the listed documents is apparent, and any possible doubt could readily have been resolved had the district court examined the documents.

From all of the above, it is an obvious fact that the discovery orders compel the disclosure of confidential matter for adversary inspection.

**B. The Decisions Below Are Unreasonable:**

The decisions below thus present the spectacle of a court's refusal to inform itself from readily available sources before compelling the production of confidential matter for adversary inspection. The decisions serve no discernible interest. This unreasonable result is neither required nor justified by any articulated need for the documents, or by any provision of the discovery rules.

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[22]The departmental rules for access to the contents of inmate files changed during the course of the proceedings below to conform to *In re Olson*, 37 C.A.3d 783, 112 Cal.Rptr. 579 (1974), (A. 604-606). Defendants' opposition to plaintiffs' requests for the files of the named plaintiffs refer to the old regulations (see, A. 58, 73-75). The new regulations, effective August 1974, are at A. 606-645.



**1. Plaintiffs' Need for the Documents Is, at Most, Dubious:**

**a. The Kinds of Rights Claimed Have Been Established in Other Cases Without Such Discovery:**

Most of the items sought by plaintiffs have been obtained in other cases without such discovery demands. The requirments of due process at parole revocation proceedings have been delineated by this Court in *Morrissey v. Brewer,* 408 U.S. 471 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). Due process at prison disciplinary proceedings has been delineated in *Wolff v. McDonald,* 418 U.S. 539 (1974). Due process at California parole rescission hearings has been delineated in *In re Prewitt,* 8 Cal.3d 470, 503 P.2d 1326 (1972), and *Gee v. Brown,* 14 Cal.3d 571, ..... P.2d ..... (1975) (applying the rights set forth in *Morrissey,* and in *Scarpelli,* to state parole rescission). For parole consideration proceedings, a California state prisoner is given notice, an opportunity to appear and be heard, and to offer written information. He has the right to apply for parole, to have his application duly considered, to a good faith exercise of discretion which is neither arbitrary nor capricious, and to periodic reconsideration for parole. *In re Minnis,* 7 Cal.3d 639, 498 P.2d 997 (1972). He has the right to examine the documents relied on for consideration of parole (except for confidential matter the disclosure of which would jeopardize institutional security, or an informant), *In re Olson,* 37 Cal.App.3d 783, 112 Cal.Rptr. 579 (1974), and he has the right to a definitive written statement of reasons for denial of parole, *In re Sturm,* 11 Cal.3d 258, 521 P.2d 97 (1974).

The above cases are habeas corpus cases, and not civil rights actions, and all proceeded without the sweeping discovery demanded here by plaintiffs. See, *Harris v. Nelson,* 394 U.S. 286, 295-296 (1969).

**b. Any Need of Plaintiffs for the Documents Is Minimized by the Other Discovery Furnished in this Action:**

Whether process is due at state parole consideration proceedings depends primarily on the weight and nature of the inmates' interests involved,[23] and what process is due will depend on the involved interests of the state as well as of the inmate. *Morrissey v. Brewer, supra,* 408 U.S. at 483-486. The nature of the proceeding and the possible burden cast on it by the proposed rights may also be considered. See, *Hannah v. Larche,* 363 U.S. 420, 442 (1960).

The other discovery afforded plaintiffs in massive proportions will obviously serve to fully inform plaintiffs and the district court of each of the above considerations. This circumstance may be taken to greatly minimize plaintiffs' need for the documents. *United States v. Reynolds, supra,* 345 U.S. at 11. On the other hand, there is no reason to suspect that the contents of any of the confidential documents will further inform plaintiffs or the court of any of these interests. Indeed, plaintiffs' need for these documents is so vague that, if defendants refused to produce

[23]This interest is something less than the parolee's interest involved in a revocation proceeding:

> "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." *Morrissey v. Brewer, supra,* 408 U.S. 471, footnote 8 at 482 (1972).



them, the district court would be ill equipped to impose the Rule 37(b) (2) (A) sanction, i.e., ordering established any designated facts concerning which the discovery was sought. Compare, *United States v. Reynolds, supra,* 345 U.S. at 5.

**2. It Was Sufficient for Defendants to Assert a Qualified Privilege Through Counsel:**

**a. The Reasons for the Formal Requisites of Reynolds Are Absent in This Case:**

*United States v. Reynolds, supra,* 345 U.S. 1 (1953), involved assertion of an absolute privilege from disclosure, even to the court, by a person not a party to the action, and concerned documents the confidentiality of which was not apparent until described in the assertions of privilege by the Secretary of the Air Force (345 U.S. at 3-5). This Court reasoned that assertion of the privilege need not be so detailed as to disclose what the privilege is meant to protect, that some formula of compromise of competing interests must be applied, that judicial control over evidence in a case cannot be abdicated to the caprice of executive officers, and that, in each case, the showing of necessity which is made by the proponent of discovery will determine how far the court should probe in satisfying itself that the occasion for invoking privilege is appropriate (345 U.S. at 9-11).

*The result* in *Reynolds* was that, without any *in-camera* inspection, a formal claim of privilege prevailed over dubious necessity. (345 U.S. at 11).[24]

[24]Although the opinion in *Reynolds* refers to a formal assertion of privilege by the head of the department having control over the documents sought, the Court also considered the affidavit of the

In the instant case only a qualified or conditional privilege was ultimately claimed; it was claimed by parties who are also the heads of the departments (Director of Corrections; Chairman of the Adult Authority) having control over the documents; the confidentiality of the documents was obvious from their description by the proponent of discovery; and plaintiffs' need for the documents was dubious on its face, and made more dubious by the other discovery afforded in massive proportions.

*No* abdication of judicial control over the evidence in the case was sought or intended by defendants. Indeed, defendants' request for an *in-camera* inspection of the documents is the very antithesis of this important concern expressed in *Reynolds*. Defendants sought direct judicial control over the evidence. If any such abdication is involved in this case, it is to the self-restraint of vigorous adversaries.

Upon the relative strength of the assertions of confidentiality and necessity in this case, the district court should have accepted the assertions of confidentiality, or examined at least some of the documents prior to determining whether their compelled disclosure for adversary inspection (and copying) is justified under the circumstances of this case.

**b. The District Court's Order Precludes Compliance with Reynolds:**

By its terms, the discovery order for production of inmate files precludes attempts to meet the procedures

Judge Advocate General. The affidavit is more descriptive, but nevertheless seems to be an assertion by the attorney for the department head.



of *Reynolds*. Until the plaintiffs designate the 200 inmates whose files are to be produced, it is impossible to actually consider the particular documents whose confidentiality will be jeopardized. When the first group of about 20 inmates was designated, attempts to segregate particular documents for such consideration were met with threats of contempt. The resulting order makes it unmistakably clear that nothing may be withheld from immediate production on demand by plaintiffs:

> "All such central files made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters, or other papers of any kind, shape or form, having been removed altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (A. 648).

**3. A Protective Order Is No Substitute for a Well Taken Privilege of Non-Disclosure:**

The district court's discovery orders each compel the disclosure of confidential matter under protective orders designed to limit inspection of the documents to counsel for plaintiffs, and a few designees of such counsel, and to limit use of the documents to what is necessary, in the minds of such counsel, to the action. Nevertheless, if defendants' assertions of confidentiality are well taken, the documents are privileged from any disclosure. The needless disclosure of confidential matter to an adversary in fact jeopardizes what the privilege is meant to protect. See *United States v. Reynolds, supra,* 345 U.S. at 10. Accordingly, a protective order is no substitute for the privilege.

**C. The Decisions Below Are Neither Required Nor Justified by the Federal Rules:**

The rules of procedure except "privileged" matter from the scope of discovery,[25] but neither define the term, nor specify how assertions of privilege must be made or determined. In *United States v. Reynolds, supra,* this Court stated: "We think it should be clear that the term 'not privileged', as used in Rule 34, refers to 'privileges' as that term is understood in the law of evidence." 345 U.S. at 6.

There are three further considerations. First, Rule 26(b) (1) also states "it is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Second, in federal question cases in the district courts there is no certain law of evidence concerning "privilege" and chances for establishment of such law have been stifled by the evolvement and enactment of Rule 501, Federal Rules of Evidence.[26]

[25]Rule 26(b)(1), Federal Rules of Civil Procedure. The scope of discovery of documents under Rule 34 is limited by this provision:

> "Rule 34. Production Of Documents And Things And Entry Upon Land For Inspection And Other Purposes. (a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . . which constitute or contain matters within the scope of Rule 26 (b). . . ."

Rules 34, Federal Rules of Civil Procedure.

[26]ARTICLE V. PRIVILEGES

RULE 501

GENERAL RULE

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivisions thereof shall be determined in accordance with State law.



Third, the law of evidence is unsuited to accommodate the competing interests in pre-trial discovery demands for the disclosure of government documents which are confidential. Whether particular documents are confidential depends neither on the law of evidence nor on the nature of the pending action, but depends on independent interests and policies. Whether documents which are confidential should nevertheless be disclosed should depend on the needs and circumstances peculiar to the pending action.

What the term "privileged" should be taken to mean, and what *Reynolds* and numerous other cases treating the matter take it to mean,[27] is that the need for a confidential matter to remain so is greater than the need of the proponent for its disclosure in a particular case. This view would require only that, when confronted with an objection to the production of confidential matter, district courts take it upon themselves to exercise informed discretion in a reasonable manner. Whether particular matter is confidential may appear from the description of the matter in the demand for it, in the objection to its production, or, as

[27]See, e.g., *United States v. Nixon,* 418 U.S. 683 (1974); *Jabarra v. Kelly,* 62 F.R.D. 424 (E.D.Mich.1974); *Holmes v. Gardner,* 62 F.R.D. 70 (E.D.Pa.1974); *Gaison v. Scott,* 59 F.R.D. 70 (E.D.Pa. 1974); *Gaison v. Scott,* 59 F.R.D. 347 (E.D.Ha. 1973); *Frankenhauser v. Rizzo,* 59 F.R.D. 339 (E.D.Pa.1973); *Zeiss,* supra, 40 F.R.D. 318, 324ff (D.C.1966).

necessary, from examination of the document by the court—considered in the light of reason and experience. Similarly, the proponent's need for the matter may be made known to the court from the pleadings in the action, or from some other particularized showing—also considered in the light of reason and experience.

We have heard much below of the peculiar standing of a litigant to obtain information to advance his claim in federal court. No interest asserted by defendants would tend to unreasonably abridge this interest of plaintiffs. Defendants seek only to insulate the confidential documents from needless disclosure by placing between the documents and the adversary an informed exercise of discretion by the district court. No provision of federal law, of which defendants are aware, requires less. Indeed, for the reasons set forth in Argument II of this brief, the Fourth Amendment precludes outright rejection of the interests asserted by defendants.

*Reynolds* speaks of a reasonable formula of compromise between competing interests. 345 U.S. at 8-9. Apropos is the court's observation in *N.L.R.B. v. Capitol Fish Company,* 294 F.2d 868 (5th Cir. 1961):

> "As a matter of comity courts frequently do not require disclosure of the evidence when the *circumstances indicate* that the records should be confidential; if the court wishes to scrutinize it to make sure, the evidence may be examined *in-camera*. But the ultimate determination of the privilege remains with the courts." (Emphasis added). 294 F.2d at page 875.



Such expressions of reasonable compromise and comity, are especially compelling in the instant case. One district court has observed:

> "Discovery must be kept in bounds by weighing the burdens of production against the importance of the information sought. In the final analysis, this is what the numerous cited decisions really teach." *United States v. R.J. Reynolds Tobacco Company,* 268 F.Supp. 769, 774 (D.N.J. 1966).

The especially high potential for abuse of the liberal federal discovery rules by prisoners suing their custodians has been frequently noted. See, *Harris v. Nelson, supra,* 394 U.S. 286, 297 (1969); *United States Board of Parole v. Mehrige,* 497 F.2d 25, 29 (4th Cir. 1973), cert. denied 417 U.S. 918 (1974); *Scarpa v. United States Board of Parole,* 477 F.2d 278, 283 (5th Cir. 1973) (Brown, J. concurring), vacated and remanded for reconsideration of mootness, 414 U.S. 809 (1973); *Weller v. Dickson,* 314 F.2d 598, 602 (9th Cir. 1963) (Duniway, J., concurring) The potential for abuse has become a reality in this case. A line should have been drawn long ago by the district court, but was not.

The decisions below would invade recognized interests which are evident and important. Yet no discernible interest of plaintiffs is thereby served. The decisions are uninformed, unreasonable and incorrect. They should be corrected as should be the procedure by which they were made.

## II

### THE FOURTH AMENDMENT PRECLUDES COMPELLING PRODUCTION OF CONFIDENTIAL STATE DOCUMENTS WITHOUT A PRIOR INFORMED DETERMINATION THAT THE DOCUMENTS ARE NOT PRIVILEGED.

Expectations of privacy, insofar as they are reasonable, are protected by the Fourth Amendment. Compulsory process for the production of documents may not issue in derogation of the Fourth Amendment. Just as a search warrant may issue only upon probable cause, compulsory process may issue only upon statutory or constitutional authorization. Confidential state documents are privileged unless there is a showing and a determination that their utility in the litigation is paramount to their confidentiality. As there is no statutory authority for an order compelling the production of privileged documents, there is no statutory basis for an order compelling the production of confidential state documents without a prior informed determination that the documents are not privileged.

Moreover, there is no constitutional basis for a statute authorizing a federal court to compel the production of confidential state documents without any informed assessment as to whether or not their utility in resolving a claimed deprivation of federal rights by state officers is paramount to their confidentiality. Even when compulsory process is issued pursuant to a statutory and constitutional authorization, it runs afoul of the Fourth Amendment if the documents sought are not reasonably relevant to the underlying



purpose of the authorization, or if the specification of the documents is inadequate or excessive.

As the orders of the district court are without statutory and constitutional authorization, and as they are patently unreasonable, they must be set aside.

#### A. As the Expectation That Confidential State Documents Will Not Be Disclosed Unless the Justification for Disclosure Outweighs the Justification for Confidentiality is a Reasonable Expectation, It Is Protected by the Fourth Amendment:

The essence of the Fourth Amendment is the protection of reasonable expectations of privacy. As stated by this Court in *Warden v. Hayden,* 387 U.S. 294, 304 (1967): "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts. (Citations omitted)." *See also Olmstead v. United States,* 277 U.S. 438, 478 (1928) [Brandeis, J., dissenting]. Accordingly, an expectation of privacy can be recognized in the complete absence of any property claim. *See Warden, supra,* 387 U.S. at 305. The protection afforded by the Fourth Amendment is not reserved solely for those suspected of criminal conduct. *See Camara v. Muncipal Court,* 387 U.S. 523 (1967). That which one "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. (Citations omitted)." *Katz v. United States,* 389 U.S. 347, 351-352 (1967). This Court "referred in *Mapp v. Ohio,* 367 U.S. 643, 656, to the Fourth Amendment as creating a 'right to privacy, no less important than any other right carefully

and particularly reserved to the people.' (Citations omitted)." *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965). Accordingly, an intrusion into the privacy upon which one has justifiably relied may constitute a search and seizure within the meaning of the Fourth Amendment. *See Katz, supra,* 389 U.S. at 353.

When a person communicates information to government officials in confidence, he may reasonably expect that the confidence will be maintained unless a justification for disclosure is found to outweigh the justification for confidentiality. In such circumstances, the reasonable expectation is not that disclosure is inevitable *(cf. Couch v. United States,* 409 U.S. 322, 335-336 (1973); *Grosso v. United States,* 390 U.S. 62, 66 (1968)), but rather that confidentiality will be asserted. Even though the government officials may desire the information, this does not in and of itself render the information public. *See Marchetti v. United States,* 390 U.S. 39, 57 (1968); *Grosso, supra,* 390 U.S. at 68. Information does not automatically assume a public character even when it is demanded by statute. *See Marchetti, supra,* 390 U.S. at 57; *Grosso, supra,* 390 U.S. at 68. Even with respect to so-called "required records", this Court has noted that "nothing in logic nor historical practice requires Congress at the same time to treat the records as public in the sense that they be open at all times to scrutiny by the merely curious. (Citation omitted). . . . [T]his opinion neither requires nor permits it." *Shapiro v. United States,* 335 U.S. 1, 27-28, n. 33.



A variety of interests are served by giving recognition to the expectation that information conveyed in confidence will not be disclosed absent an overriding justification. The state has an interest in obtaining information regarding its employees. *See Shelton v. Tucker,* 364 U.S. 479, 485 (1960). Third parties might be reluctant to provide information if disclosure of the information was mandatory. Similarly, persons might be reluctant to enter state service if a disclosure of all the information acquired by the state were required. It is not inconceivable that public exposure would lead to public pressure to have employees removed for reasons unrelated to their fitness and qualifications. *Cf. Shelton, supra,* 364 U.S. at 486-487.[28] The state likewise has an obligation to foster the rehabilitation of persons confined in correctional institutions and to insure the internal security of such institutions. *Pell v. Procunier,* 417 U.S. 817, 823 (1974). It is possible that various persons both within and outside of the correctional setting may have information relevant to these purposes which they might withhold if disclosure of the information was mandatory. In *Wolff v. McDonnell,* 418 U.S. 539, 567-569 (1974), this Court recognized that the disclosure of the identity of persons providing certain information could pose a serious threat to the security of correc-

[28]In *Shelton* this Court recognized that the public disclosure of the type of information which was required to be submitted by school teachers would serve to aggravate the impairment of the teachers' First Amendment rights. *Shelton, supra,* 364 U.S. at 486-487. Public disclosure of information regarding the personal

tional institutions.[29] Accordingly, numerous interests warrant the recognition of the expectation that information conveyed in confidence will not be disclosed in the absence of an overriding justification.

It is not suggested that it would be reasonable to expect that all information conveyed in confidence would never be disclosed. It is, however, urged that it is reasonable to expect that such information will not be disclosed without a determination that the need for disclosure outweighs the need for confidentiality. As this expectation is reasonable, the fact that it is not

lives of state employees might give rise to a claim of impairment of other protectable interests. *See generally Griswold v. Connecticut, supra,* 381 U.S. 479, 482-485 (1965).

[29]With respect to prison disciplinary proceedings, this Court observed: "If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls." *Wolff, supra,* 418 U.S. at 567. This Court further stated: "We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story privately to prison officials, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem. There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. However, any constitutional rule tailored to meet these situations would undoubtedly produce great litigation and attendant costs in a much wider range of cases. Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there would be a limited basis for upsetting such judgments." *Wolff, supra,* 418 U.S. at 568-569.



an expectation of absolute privacy does not deprive it of Fourth Amendment protection. *See Mancusi v. DeForte,* 392 U.S. 364, 369-370 (1968).

When a state government official's duties include control over confidential documents, he may reasonably expect that he will not be compelled to disclose the documents in the course of civil litigation unless the litigant's justification for disclosure is found to outweigh those interests which the privilege of nondisclosure protects. *See EPA v. Mink,* 410 U.S. 73, 86-87 (1973). In such circumstances, the official cannot be said to be assuming a duty to disclose documents,[30] but rather is assuming a duty to assert the confidentiality of the documents. In short, as a representative of the public, the official has a duty to act in accordance with the interests of the public. "All such positions are trusts to be exercised from considerations of duty and for the public good." *Oscanyan v. Arms Co.,* 103 U.S. 261, 273 (1880).[31] Where disclosure of the information would be inimical to the public interest, the official may reasonably expect that he will not be compelled to disclose the documents unless there is a

[30]In *Wilson v. United States,* 221 U.S. 361, 380 (1911), it was observed that with respect to public records and official documents, the custodian had assumed a duty which superceded his claim of the privilege against self-incrimination. As the question of whether a custodian may invoke his own Fifth Amendment privilege is distinct from the question of whether a public official may invoke a governmental privilege, the language in *Wilson* in no way abrogates the duty of a public official to properly protect confidential documents.

[31]*See generally,* "Deterring Misuse of Confidential Government Information: A Proposed Citizens' Action," Joseph J. Kalo, 72 Mich.L.Rev. 1577 (1974).

determination that their utility in the litigation is paramount to the reasons for their confidentiality.

The "'right to privacy, [is] no less important than any other right carefully and particularly reserved to the People.' (Citations omitted)." *Griswold v. Connecticut, supra,* 381 U.S. 479, 485 (1965). State officers are no more[32] and no less[33] than the agents of the People. Unless government officers who have control over confidential documents assert this right, it could be effectively diluted. *Cf. Griswold, supra,* 381 U.S. at 481. In some circumstances, to require those whose privacy might be invaded to seek to restrain compliance with a motion to produce documents might result in an abrogation of their rights at the moment of their assertion. *Cf. N.A.A.C.P. v. Alabama,* 357 U.S. 449, 459 (1958). When it is the action of a court which might result in the denial of a constitutional right, the right might be irreparably abridged if not asserted by a party to the litigation. *See Barrows v. Jackson,* 346 U.S. 249, 257 (1953).

As it is reasonable to expect that confidential documents will not be disclosed unless it is shown that the justifications for disclosure are paramount to the reasons for confidentiality, such expectation is protected by the Fourth Amendment. By refusing to

[32]Article I, section 24, of the Constitution of California provides in pertinent part as follows: "This declaration of rights may not be construed to impair or deny others retained by the People."

[33]Article I, section 26, of the Constitution of California provides: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."



inspect *in camera* the contested documents, the court below effectively foreclosed any opportunity for determing if such expectation was involved.

**B. As Compulsory Process for the Production of Documents is a Constructive Search and Seizure, it may not Issue in Derogation of the Limitations Inherent in the Fourth Amendment:**

It was recognized early in our history that the essence of a search and seizure is not the physical intrusion and taking of property, but rather is the element of compulsion to produce that which is otherwise protected. *See Boyd v. United States,* 116 U.S. 616, 621-622 (1886). The basic interest protected by the Fourth Amendment is not just the right to be free from physical intrusions, but rather is the right to be free from unwarranted invasions of privacy. *See Boyd, supra,* 116 U.S. at 630.[34]

Accordingly, it must be recognized that "the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men' (citation omitted) is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process, (citations omitted), . . ." *United States v. Morton Salt Co.,* 338 U.S. 632, 651-652 (1950). "[T]he subpoena, which has been termed a 'constructive' search, (citation omitted), is subject to Fourth Amendment limitations . . . *See v.*

[34]The vitality of the decision in *Boyd*, as well as its significance in the development of constitutional law, has been repeatedly recognized. *E.g., Olmstead v. United States, supra,* 277 U.S. 438, 474-475 (1928) (Brandeis, J., dissenting); *Mapp v. Ohio, supra,* 367 U.S. 643, 646-647 (1961); *Griswold v. Connecticut, supra,* 381 U.S. 479, 484 (1965).

*City of Seattle,* 387 U.S. 541, 545 (1967). As observed by this Court: "[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Hale v. Henkel,* 201 U.S. 43, 76 (1906). Accordingly, compulsory process for the production of documents may not issue in derogation of the limitations inherent in the Fourth Amendment. *See v. City of Seattle, supra,* 387 U.S. at 544-545.

**1. As An Order Compelling the Production of Confidential State Documents Without a Prior Determination That the Documents Are Not Privileged is Not Authorized by Statute, the Order Contravenes the Fourth Amendment:**

As stated by this Court, "The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production *by the court's determination that the investigation is authorized by Congress, . . .*" *Okla. Press Pub. Co. v. Walling,* 327 U.S. 186, 209 (1946) (emphasis added). Accordingly, just as a search warrant may issue only upon a finding of probable cause, compulsory process may issue only upon a finding that it is authorized by statute. *See United States v. Morton Salt Co., supra,* 338 U.S. 632, 652 (1950); *See v. City of Seattle, supra,* 387 U.S. 541, 544 (1967); *Shotkin v. Nelson,* 146 F.2d 402, 404 (10th Cir. 1944). *Cf. Fed. Trade Comm. v. Amer. Tobacco Co.,* 264 U.S. 298 (1924).

Under the principle stated in *Oklahoma Press,* the court is required, in ruling upon a motion pursuant to Rule 37(a) (2) of the Federal Rules of Civil



Procedure for an order compelling the production of documents, to determine whether or not the production is authorized by statute. Rule 26(b) (1) of the Federal Rules of Civil Procedure explicitly excepts from discovery those matters which are privileged. Confidential state documents are privileged unless there is a showing and a determination that their utility in the litigation is paramount to the reasons for their confidentiality.

The district court, by refusing to inspect the contested documents *in camera,* foreclosed the possibility of an informed determination of whether or not the documents were privileged. This refusal by the district court is analogous to a refusal by a magistrate to read the affidavits submitted in support of an application for a search warrant.

Accordingly, the orders below compelling the production of confidential state documents, without an *in camera* inspection and determination of whether or not the production of such documents was authorized under Rule 26(b) (1) of the Federal Rules of Civil Procedure, is as defective as the issuance of a search warrant without an informed determination of probable cause for its issuance.

As confidential state documents are privileged unless there is an informed determination by the courts that their utility in the litigation is paramount, and as there is no statutory authority for an order compelling the production of privileged documents, it must be concluded that the orders issued in the instant proceeding contravene the Fourth Amendment.

**2. As an Order by a Federal Court Compelling the Production of Confidential State Documents Without Any Informed Assessment of Their Utility in Resolving an Allegation of a Deprivation of Federal Rights Is Not Authorized by the Constitution, the Order Contravenes the Fourth Amendment:**

As further stated by this Court, "the requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production *by the court's determination that the investigation . . . , is for a purpose Congress can order, . . .*" *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 209 (1946) (emphasis added). Accordingly, just as a search warrant may issue only upon a finding of probable cause, compulsory process may issue only upon a finding that there is no constitutional bar to its issuance *(see Gibson v. Florida Legislative Comm.,* 372 U.S. 539, 545 (1963)), and that there is constitutional authorization for its issuance *(cf. Fed. Trade Comm. v. Amer. Tobacco Co., supra,* 264 U.S. 298 (1924)). *See Okla. Press Pub. Co., supra,* 327 U.S. at 214; *Shotkin v. Nelson, supra,* 146 F.2d 402, 404 (10th Cir. 1944).

Under these principles, it is the duty of the court, in ruling upon a motion pursuant to Rule 37(a) (2) of the Federal Rules of Civil Procedure for an order compelling production of documents, first to determine if production of the documents is barred by a constitutional provision, and second to ascertain whether the court has constitutional authority to grant the order. The district court, by refusing to inspect the contested documents *in camera,* foreclosed the possibility of a determination of either issue.



As is set forth above (Argument II A.), the expectation that confidential state documents will not be disclosed unless it is determined that the justification for disclosure outweighs the justification for confidentiality is reasonable and is thus protected by the Fourth Amendment. Accordingly, if after having examined confidential state documents *in camera,* the court determined that there was no justification for disclosing the documents to the proponent of the motion, the Fourth Amendment would bar an order compelling production of the documents.

The district court's refusal to examine the contested documents *in camera* constituted an abdication of the court's duty to determine whether or not production was barred by the Fourth Amendment. By compelling production without any informed determination that the justification for disclosure was paramount to the reasons for confidentiality, the district court infringed the reasonable expectation that disclosure would not be required absent such a finding. Accordingly, the orders compelling production contravene the Fourth Amendment.

By refusing to examine the documents *in camera,* the district court likewise foreclosed a determination of whether the district court had constitutional authority to compel the production of the documents. In effect, the court failed to insure that it had jurisdiction to issue the orders for production.

The unique nature of the discovery compelled by the challenged orders is of critical significance. These

orders do not involve compelling individual state officers to respond to questions regarding their family background, their education, their professional training, their employment history, their physical and mental condition, and their professional and personal associations. These orders do not involve compelling individual state officers to respond to questions concerning the procedures which they employ in arriving at decisions in prison disciplinary or parole proceedings, the information considered by them in such proceedings, the criteria employed by them in arriving at decisions, and the reasons for their decisions. Rather, these orders involve compelling the production of state documents. In short, the orders are not concerned with obtaining discovery from individual defendants, but rather with obtaining discovery from the state.

In *Sugarman v. Dougall,* 413 U.S. 634, 648 (1973), this Court expressed "recognition of a State constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public officeholders. (Footnote omitted). U.S. Const. Art. IV, § 4; U.S. Const. Amdt. X; (other citations omitted)." As further observed by this Court: "Just as 'the Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections,' (citations omitted), '[e]ach State has the power to proscribe the qualifications of its officers and the manner in which they shall be chosen.' (Citations omitted). Such power inheres in the State by virtue of its obligation,



already noted above, 'to preserve the basic conception of a political community.' (Citation omitted). And this power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Sugarman, supra,* 413 U.S. at 647. Accordingly, it is submitted that the maintenance by the state of the personnel files, which the district court has ordered produced, is ancillary to the state's exercise of its political powers under the Tenth Amendment.

The administration of correctional facilities is likewise a function of state government. As observed by this Court: "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prison." *Preiser v. Rodriguez,* 411 U.S. 475, 491-492 (1973). Accordingly, it is further submitted that the maintenance by the state of certain confidential records, which the district court has ordered produced, is likewise ancillary to the state's exercise of its governmental powers and responsibilities.

As stated by former Chief Justice Stone: "It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern." *Snowden v. Hughes,* 321

U.S. 1, 11 (1944). As observed by this Court: "[The] ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. (Citations omitted)." *Great Northern Ins. Co. v. Read,* 322 U.S. 47, 51 (1944).

"A state's freedom from litigation was established as a constitutional right through the Eleventh Amendment." *Great Northern Ins. Co. v. Read, supra,* 322 U.S. 47, 51 (1944). "This express constitutional limitation denied to the federal courts authority to entertain a suit brought by private parties against a state without its consent. (Citations omitted)." *Ford Co. v. Dept. of Treasury,* 323 U.S. 459, 464-465 (1945). "While the Amendment by its terms does not bar suits against a State by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in federal courts by her own citizens as well as by citizens of another State. (Citations omitted)." *Edelman v. Jordan,* 415 U.S. 651, 662-663 (1974).

"Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' (Citations omitted). But the immunity may of course be waived; . . ." *Parden v. Terminal R. Co., supra,* 377 U.S. 184, 186 (1964). "But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action can be brought under that section against state officers, rather than against the State itself."



*Edelman v. Jordan, supra,* 415 U.S. 651, 675-677 (1974).

"It is also well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment." *Edelman v. Jordan, supra,* 415 U.S. 651, 663 (1974). "[T]he crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign. (Footnote omitted)." *Larson v. Domestic & Foreign Corp.,* 337 U.S. 682, 687 (1949). "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property. (Citation omitted)." *Larson, supra,* 337 U.S. at 691, n. 11; *see Hopkins v. Clemson College,* 221 U.S. 636, 648-649 (1911). As the documents which are the subject of the contested orders compelling discovery are confidential state documents, such documents are unquestionably state property.

As recognized by this Court: "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Co. v. Dept. of Treasury, supra,* 323 U.S. 459, 467 (1945). As this Court recently observed, "it has been well settled since

the decision in *Ford Motor Co. v. Department of Treasury, supra,* that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court: . . ." *Edelman v. Jordan, supra,* 415 U.S. 651, 677-678 (1974).

Given the facts of the proceedings below, it is not necessary to determine whether the Eleventh Amendment poses a jurisdictional bar to all discovery orders for the production of state documents. Nor is it necessary to determine whether the Eleventh Amendment precludes all discovery orders for the production of confidential state documents. Rather, the question posed is whether the Eleventh Amendment precludes an order for the production of confidential state documents when such documents are not clearly probative of a claimed violation of federally protected rights.

It is submitted that the latter question must be answered in the affirmative. As stated by this Court: "[The] ruling that a state could not be controlled by courts in the performance of its political duties through suits against its officials has been consistently followed. (Citations omitted). Efforts to force, through suits against officials, performance of promises by the state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution. (Citations omitted)." *Great Northern Ins. Co. v. Read, supra,* 322 U.S. 47, 51 (1944). It is submitted that the application of this reasoning to a motion to compel the production of confidential state



documents requires the conclusion that the Eleventh Amendment precludes an order requiring the production of such documents unless it has been determined that the probative value of the documents with respect to a claimed deprivation of federal rights outweighs the reasons for confidentiality.

The district court, by refusing to examine the contested documents *in camera,* foreclosed a determination of whether the court had jurisdiction to compel production of all the contested documents. "The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production by the court's determination that the investigation . . . is for a purpose Congress can order, . . ." *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 209 (1946). By refusing to examine the contested documents *in camera,* the district court abdicated its responsibility of determining whether it had jurisdiction to order the production of all the documents. Accordingly, it must be concluded that the orders below issued in derogation of the basic requirements of the Fourth Amendment.

**3. An Order Compelling Production of Confidential State Documents Without a Prior Informed Determination That the Utility of the Documents is Paramount to the Reasons for Confidentiality is as Defective as is a Search Warrant Issued Without Probable Cause:**

As stated by this Court: "The requirement of 'probable cause, supported by oath or affirmation,' literally applicable in the case of a warrant, is satisfied in that of an order for production by *the court's deter-*

*mination that . . . the documents sought are relevant to the inquiry.* (Footnote omitted)." (Emphasis added). *Okla. Press Pub. Co. v. Walling,, supra,* 327 U.S. 186, 209 (1946); *see United States v. Morton Salt Co., supra,* 338 U.S. 632, 652 (1950); *See v. City of Seattle, supra,* 387 U.S. 541, 544 (1967).

The basic principle that the power to compel information may not be used to obtain information not relevant to the authorized purpose of the inquiry has been invoked by this Court in a variety of contexts. With respect to the power of Congress to compel testimony, this Court stated: "There is no general authority to expose the private affairs of individuals without justification in terms of the functions of Congress. . . . No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins v. United States,* 354 U.S. 178, 187 (1957). With respect to the power of the grand jury to compel testimony which may impinge upon a confidential relationship, this Court stated: "Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." *Branzburg v. Hayes,* 408 U.S. 665, 707-708 (1972); *see also Id.,* at 710 (Powell, J., concurring); *United States v. Dionisio,* 410 U.S. 1, 12 (1973). As stated by Mr. Justice Holmes, with respect to the power of the Federal Trade Commission to compel the production of corporate records: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. . . . The right of access given by the statute is to documentary evidence—not to all documents, but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it." *Fed. Trade Comm. v. Amer. Tobacco Co., supra,* 264 U.S. 298, 306 (1924).



Rule 34(a) of the Federal Rules of Civil Procedure does not entitle a party to demand production of any and all documents. Rather, only documents which are not privileged and which are relevant to the subject matter may be demanded. F.R.Civ.P. 26(b) (1); *cf. Fed. Trade Comm. v. Amer. Tobacco Co., supra,* 264 U.S. 298, 306 (1924). Accordingly, on a motion pursuant to Rule 37(a) to compel production of documents, the court, in order to determine that the documents sought are within the scope of inquiry authorized by the discovery rules, must determine that the documents are not privileged and that the documents are relevant to the subject matter of the action. If the court fails to make these determinations, any resulting order is as defective as is a search warrant issued without a prior finding of probable cause.

Confidential state documents are entitled to be treated as privileged, unless their utility in the litigation is found to be paramount to the reasons for their

confidentiality.[35] Accordingly, such documents are not within the authorized scope of inquiry unless the latter determination is reached.

In the instant case, by refusing to examine the contested documents *in camera* the district court abdicated its duty of resolving this issue. Accordingly, the orders for production are as defective as is a search warrant issued without probable cause, as they issued without any informed determination that the documents came within the scope of inquiry authorized by Rule 26(b)(1).

**4. A General Order to Produce Confidential State Documents Without a Prior Determination That Their Utility in the Litigation Outweighs Their Confidentiality, is as Defective as is a General Search Warrant:**

This Court has likewise stated: "[T]he requirement of reasonableness, including particularity in 'describing the place to be searched, and the persons or things to be seized,' also literally applicable to warrants, comes down to specification of the documents to be produced adequate, but not excessive, for the purposes of the relevant inquiry." *Okla. Press Pub. Co. v. Walling, supra,* 327, U.S. 186, 209 (1946); *see, See v. City of Seattle, supra,* 387 U.S. 541, 544 (1967). An order to produce documents which is too broad to be regarded as reasonable effectuates an unreasonable search and seizure. *See United States v. Dionisio,*

[35]Given the nature of the confidential state documents sought and the subject matter of this litigation, it is submitted that the district court could have properly denied the motion at the outset on the ground that the documents bore no reasonable relationship to the claimed deprivation of federal rights.



*supra,* 410 U.S. 1, 11 (1973); *Hale v. Henkel,* supra, 201 U.S. 43, 76 (1906). As stated by this Court: "A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms. (Citations omitted)." *Hale, supra,* 201 U.S. at 77.

Before a court will grant a broad request for the production of documents, there must be some evidence of their necessity or of their materiality. *See Hale v. Henkel, supra,* 201 U.S. 43, 77 (1906). As stated by Mr. Justice Holmes: "It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up." *Fed. Trade Comm. v. Amer. Tobacco Co., supra,* 264 U.S. 298, 306 (1924). The documents which are to be produced must be described with particularity. *See Hale, supra,* 201 U.S. at 77. Where the precise contents of the documents can be determined, a general order for production is unreasonable. *Cf. McPhaul v. United States,* 364 U.S. 372, 382 (1960).

Confidential state documents are not subject to discovery unless it is determined that their utility in the litigation outweighs the reasons for their confidentiality. When the documents are offered for *in camera* inspection, the precise contents of the documents are known to the court. The court may determine specifically which documents or parts of documents are of such significance to the litigation that they may be the subject of discovery. Any resulting order to compel must necessarily specify with particu-

larity those matters which have been found by the court to be discoverable. A general order to produce all the confidential documents, without regard to whether or not their utility in the litigation is paramount, would be patently unreasonable.

The district court could have determined the precise contents of the confidential state documents by examining them *in camera*. The district court refused to do so, and instead, issued orders which are expressly all inclusive. By refusing to inspect the documents, the district court abdicated its responsibility of specifically delineating those documents which were within the scope of allowable discovery. The resulting orders are as indefensible as a general search warrant.

In short, at the core of the Fourth Amendment directive is the requirement of an informed determination by a judicial officer that there is justification for the action which is to be taken. *See Gerstein v. Pugh,* ..... U.S. ....., 95 S.Ct. 854, 862 (1975); *see also See v. City of Seattle, supra,* 387 U.S. 541, 544-545 (1967); "The gist of the protection is in the requirement, expressed in terms, that the disclosures sought shall not be unreasonable." *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 208 (1946). The district court abdicated its responsibility and its resulting orders are patently unreasonable. As the orders contravene the basic limitations inherent in the Fourth Amendment, they must be set aside.



## III

**THE COURT OF APPEALS ERRED IN DENYING DEFENDANTS' APPLICATIONS FOR MANDAMUS INASMUCH AS THE DISTRICT COURT DID NOT HAVE THE LEGAL POWER TO ACT OR REFUSE TO ACT AS IT DID.**

When confronted with the demand to produce for inspection every twentieth inmate file in the custody of defendant Procunier, Director of the Department of Corrections, Mr. Procunier and the other defendants asserted that though they were defendants they were also state government officials with responsibilities beyond the parameters of the law suit. In their view, these obligations precluded the indiscriminate revelation of the contents of their files on prison inmates. Consequently, defendants were presented with three alternatives, namely, consenting to the random search of government maintained files which might disclose information jeopardizing and compromising lives and safety; or resisting all production even though such random search might produce relevant and unobjectionable material; or permitting inspection but submitting to the district court the sensitive documents upon which the district court *in camera* might examine the merits of the claims of confidentiality and privilege. Defendants urged this latter course asking the district court to be the mediator of allegedly opposing interests. Accordingly, defendants explained to the district court their official interest in protecting individuals, including informants inside and outside of prisons, and their concern for prison security; their official need to preserve the confidentiality of records for the purpose of encouraging the candor of inmates,

staff, and inmates' families and friends; their official duty under state laws to protect the privacy of certain persons and papers (A. 173-177, 226-228, 255-259, 289-293). Defendants believed that if they were allowed to review the files as a preliminary matter, then any allegedly sensitive information might be withheld and examined by the court as a condition precedent to releasing or retaining. Notwithstanding this posture, the district court quashed defendants' efforts to segregate the confidential and privileged documents and ordered: "All such central files [200 selected by plaintiffs] made available upon request by plaintiff shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection" (petition for certiorari, appendix, p. xxvi). Defendants sought mandamus in the United States Court of Appeals for the Ninth Circuit and on December 18, 1974, the application was denied (petition for certiorari, appendix, p. xxiii).

When also faced with a demand to conduct a random search of other files maintained by the California Adult Authority and the California Department of Corrections, including the personnel files of each Adult Authority member, of each Adult Authority hearing representative and of the Adult Authority's executive officer, defendants urged that any access by plaintiffs to these personnel files, investigative reports, preliminary drafts, notes, inter-agency and intra-agency memoranda, should be preceded by an *in camera* inspection for the purposes of determining their relevances and of balancing the interest of defendants and of the public in non-disclosure against plaintiffs' interest in examining these files for the litigation. The district court declined to order such an *in camera* inspection (petition for certiorari, appendix, pp. xvi-xvii). The Court of Appeals, on defendants' application for mandamus, determined that the district court's order compelling defendants to turn over everything directly to plaintiffs was not such a usurpation by the district court that warranted the extraordinary remedy for a writ of mandamus (A. 719-720).



Both mandamus actions brought into focus the picture of prisoner plaintiffs indiscriminately searching non-public government files in an area where the state had interests to protect separate from the interests generated by the law suit. The district court, in each instance, gave plaintiffs unlimited inspection rights to government records regardless of the consequences. Defendants requesting no more than a preliminary opportunity to present their claims of confidentiality or privilege to the district court, were set adrift without remedy to meet certain, irreparable harm. Once disclosure is a fact the damage cannot be undone anymore than a bell can be unrung.[36]

[36]The so-called protective orders did not preserve confidentiality or privileges. Plaintiffs' attorneys and two certified law students are allowed unrestricted viewing of an inmate's file with photocopying of any or all contents with consent of the inmate; where photocopies are made plaintiffs may use them "as necessary for acquittal of their duties of representation in this case" (petition for certiorari, appendix, pp. xxvii-xxviii). The typical file, how-

Review by appeal from final judgment would come too late. The actions of the district court, in ordering the immediate disclosure of government documents, without affording defendants an opportunity to withhold confidential and privileged items and the occasion to offer those items for *in camera* examination, presented an issue of substantial importance, in this litigation and in other cases, which was reviewable by mandamus. Resolution of this issue will forestall future error in trial courts, eliminate any uncertainty and add importantly to the efficient administration of justice. *Schlagenhauf v. Holder,* 379 U.S. 104, 110-111 (1964) ["new and important problems"]; *LaBuy v. Howes Leather Co.,* 352 U.S. 249, 255-260 (1957) ["an abdication of the judicial function]; *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943) ["exercise its authority when it is its duty to do so"]; *see also United States v. Weinstein,* 511 F.2d 622, 626-628 (2d Cir. 1975) ["district judge clearly exceeded his powers"]; *Nixon v. Sirica,* 487 F.2d 700, 706-708 (D.C.Cir. 1973) ["great public interest in prompt resolution of the issues"].

The district court did not have the legal power to order the contents of government files, maintained by and in the custody of petitioners, indiscriminately searched by plaintiffs, and the district court misused

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ever, contains few papers written by the inmate himself, and a considerable number of papers written by other persons who have not authorized the inmate to consent to their exposition. As to the personnel files, observation and reproduction are not precluded; a restriction permits the files or copies of their content to be shown to plaintiff's attorneys and two investigators only (petition for certiorari, appendix, p. xvi).



its jurisdiction and authority in ordering over defendants' objections unrestrained access to these records and in refusing to conduct an *in camera* inspection. An important question in the administration of the Federal Rules of Civil Procedure was thus presented. A petition for a writ of mandamus was the appropriate procedure (28 U.S.C. § 1651) to review the district court's actions. *See United States v. United States District Court,* 407 U.S. 297, 301 n.3 (1972). The Court of Appeals failed to exercise this appellate supervisory power and erred in not granting the writs sought by defendants.

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## CONCLUSION

The problems presented by California in this proceeding are not unique; they represent persistent and repeated difficulties encountered by state officials who are often confronted with broad, encroaching discovery demands and orders. This litigation highlights the issues because in actions brought by state prisoners against state parole and prison administrators, questions of confidentiality and privilege of information invariably arise. Resolution of these matters in this certiorari proceeding will significantly aid the administration of justice.

Petitioners request that the orders of the Court of Appeals, and of the district court be vacated, and that the case be remanded with directions that production of the confidential documents not be compelled without a prior informed determination by the district

court that plaintiffs' need for them in the action below outweighs their confidentiality.

Dated: July 24, 1975

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
DERALD E. GRANBERG,
Deputy Attorney General,
JOHN T. MURPHY,
Deputy Attorney General,
KARL S. MAYER,
Deputy Attorney General,
JEAN M. BORDON,
Deputy Attorney General,
*Attorneys for Petitioners.*

**(Appendix Follows)**

# APPENDIX

## Appendix

(Letterhead of Youth Law Center)

June 4, 1975

*HAND DELIVERED*

Karl S. Mayer, Esq.
Deputy Attorney General
6000 State Building
350 McAllister Street
San Francisco, CA 94102

Dear Mr. Mayer:

Re: *van Geldern v. Kerr*

Now that the Supreme Court has granted *certiorari* in the *Kerr* case, it is obvious that plaintiffs will be unable to inspect 200 selected files in their entirety, as ordered by Judge Weigel. Accordingly, we are resigned to conducting our initial inspection of the requisite files subject to the withholding, by the Department, of those documents which it considers to be confidential. Since the commencement of trial is now only two months away, it is essential that we begin to inspect a limited number of central files as soon as possible, and therefore I am listing on an enclosure to this letter, the names of nine (9) inmates whose files we wish to inspect. We ask that, in a spirit of cooperation, these files be made available to us at the Ferry Building in San Francisco, as soon as possible, and in any event no later than Monday, June 16, 1975. We also ask that as little material as possible be removed from them, assuring you that we consider ourselves still bound by the provisions in Judge Wei-

gel's orders limiting our use of these documents to the *van Geldern* case.

Please telephone me at once if for any reason these files cannot be made available by June 16th as requested.

Thank you for your cooperation in this matter.

Yours very truly,

/s/ B. E. Bergesen, III

B. E. Bergesen, III

cc: Sidney M. Wolinsky, Esq.
BEB/cc
Enclosure

CENTRAL FILES TO BE INSPECTED BY PLAINTIFFS' COUNSEL IN *van Geldern v. Kerr*:

| | | |
|---|---|---|
| (1) | Michael Guile | B-5757 |
| (2) | James Snow | B-19205 |
| (3) | Charles M. Perkins | B-29898 |
| (4) | Willie C. Reaves | B-22929 |
| (5) | Stanley Lowe | B-60327 |
| (6) | Leonard J. Hodgson | B-36473 |
| (7) | L. Wayne Benner | A-84104 |
| (8) | Raymond Laursen | B-26430 |
| (9) | Robert Barry | B-18055 |



(Letterhead of Office of the Attorney General, Department of Justice)

State Building, San Francisco 94102

June 10, 1975

B. E. Bergesen, III
693 Mission Street, 2nd Floor
San Francisco, CA 94105

Re: *van Geldern v. Kerr*—Inspection of Inmate Files

Dear Mr. Bergesen:

Your letter of June 4, 1975 requests inspection of the correctional files of nine designated inmates subject to the withholding of documents considered by the Department of Corrections to be confidential. The attachment to your letter names the nine inmates designated whose files you wish to inspect, together with their correctional numbers but does not designate the institution within which they are confined. Your letter does not include the written statements of consent, if any, from the designated inmates.

I have contacted departmental counsel for the Department of Corrections and the department agrees that the inspection may take place under the following circumstances:

(1) The inspection should take place at the institution within which the inmate is confined.

(2) You should contact the institution directly to request to inspect a particular inmate's file and furnish the institution the statement of the inmate's consent for such inspection.

(3) The inspection may be carried out by licensed investigators or certified law students designated by you.

(4) Within reason you will be permitted to obtain copies of the contents of the files furnished for inspection.

In arranging for the file inspections you should contact directly the records officers of the respective institutions. Please give them as much advance time as possible to enable them to pull the files and go through them for confidential material. If the inspection will be carried out by a designated investigator a certified law student should also tell the records officer in advance of this. If any problem or question arises as a result of your contact with any of the records officers please inform me immediately of it.

I request that you furnish me in advance a list of the inmates whose files you will inspect together with their institutional number, the institution of their confinement, copies of their statements of consent to the inspection, the name of the person who will inspect the files, and the date on which you have requested the inspection to take place.

This will also confirm my understanding that you and co-counsel consider yourselves bound by the protective provisions in Judge Weigel's orders which limit use of the documents to the *van Geldern* case.

Very truly yours,
Evelle J. Younger,
Attorney General

/s/ Karl S. Mayer,
Karl S. Mayer,
Deputy Attorney General

KSM:pc

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**CALIFORNIA PENAL CODE**

**§ 11105. Information furnished; application; purpose**

(a) The Attorney General shall furnish, upon application in accordance with the provisions of subdivision (b) of this section, copies of all summary criminal history information pertaining to the identification of any person, such as a plate, photograph, outline picture, description, measurement, or any data about such person of which there is a record in the office of the department.

(b) Such information shall be furnished to all peace officers, district attorneys, probation officers, and courts of the state, to United States officers or officers of other states, territories, or possessions of the United States, or peace officers of other countries duly authorized by the Attorney General to receive the same, and to any public defender or attorney representing such

person in proceedings upon a petition for certificate of rehabilitation and pardon pursuant to Section 4852.08, upon application in writing accompanied by a certificate signed by the peace officer, public defender, or attorney, stating that the information applied for is necessary for the due administration of the laws, and not for the purpose of assisting a private citizen in carrying on his personal interests or in maliciously or uselessly harassing, degrading or humiliating any person.

(c) Such information shall not be furnished to any persons other than those listed in subdivision (b) of this section or as provided by law; provided, that such information may be furnished to any state agency, officer, or official when needed for the performance of such agency's, officer's, or official's functions.

* * *

## ARTICLE 5: EXAMINATION OF RECORDS

### § 11120. Record defined

As used in this article, "record" with respect to any person means the master record sheet maintained under such person's name by the Department of Justice, and which is commonly known as "arrest record," "criminal record sheet," or "rap sheet." "Record" does not include any other records of the department.

### § 11121. Purpose

It is the function and intent of this article to afford persons concerning whom a record is maintained in



the files of the bureau such reasonable opportunity to examine the record compiled from such files, and to refute any erroneous or inaccurate information contained therein as is consistent with the requirements and functions of the bureau.

### § 11122. Application; contents; fee

Any person desiring to examine a record relating to himself shall obtain from the chief of police of the city of his residence, or, if not a resident of a city, from the sheriff of his county of residence, or from the office of the department, an application form furnished by the department which shall require his fingerprints in addition to such other information as the department shall specify. The city or county, as applicable, may fix a reasonable fee for affixing the applicant's fingerprints to the form, and shall retain such fee for deposit in its treasury.

### § 11123. Submission of application; fee

The applicant shall submit the completed application directly to the department. The application shall be accompanied by a fee of five dollars ($5) or such higher amount, not to exceed ten dollars ($10) that the department determines equals the costs of processing the application and making a record available for examination. All fees received by the department under this section are hereby appropriated without regard to fiscal years for the support of the Department of Justice in addition to such other funds as may be appropriated therefor by the Legislature.

**§ 11124. Notice of existence of record; time of inspection; examination; authority to take notes**

When an application is received by the department, the department shall determine whether a record pertaining to the applicant is maintained. If such record is maintained, the department shall inform the applicant by mail of the existence of the record and shall specify a time when the record may be examined at a suitable facility of the department. Upon verification of his identity, the applicant shall be allowed to examine the record pertaining to him, or a true copy thereof, for a period not to exceed one hour. The applicant may not retain or reproduce the record but he may make a written summary or notes in his own handwriting.

**§ 11125. Application of prisoner; place of examination of record**

If the applicant is imprisoned in the state prison or confined in the county jail, his application shall be through the office in charge of records of the prison or jail. Such offices shall follow the provisions of this article applicable to cities and counties with respect to applications and fees. When an application is transmitted to the department pursuant to this section, the department shall make arrangements for the applicant to examine the record at his place of confinement. In all other respects, the provisions of Section 11124 shall govern the examination of the record.



**§ 1203.01. Statement of views respecting convict; filing; mailing of copies**

Immediately after judgment has been pronounced, the judge and the district attorney, respectively, may cause to be filed with the clerk of the court a brief statement of their views respecting the person convicted or sentenced and the crime committed, together with such reports as the probation officer may have filed relative to the prisoner. The judge and district attorney shall cause such statements to be filed if no probation officer's report has been filed. The attorney for the defendant and the law enforcement agency that investigated the case may likewise file with the clerk of the court statements of their views respecting the defendant and the crime of which he was convicted. Forthwith after the filing of such statements and reports, the clerk of the court shall mail a copy thereof, certified by such clerk, with postage thereon prepaid, addressed to the Department of Corrections at the prison or other institution to which the person convicted is delivered. The clerk shall also mail a copy of any statement submitted by the court, district attorney, or law enforcement agency, pursuant to this section, with postage thereon prepaid, addressed to the attorney for the defendant, if any, and to the defendant in care of the Department of Corrections, and a copy of any statement submitted by the attorney for the defendant, with postage thereon prepaid, shall be mailed to the district attorney.

**§ 2081.5. Case records; duty to keep; contents; employees; hearings**

The Director of Corrections shall keep complete case records of all prisoners under custody of the department, which records shall be made available to the Adult Authority and the Board of Trustees of the California Institution for Women at such time and in such form as each board may prescribe.

Case records shall include all information received by the Director of Corrections from the courts, probation officers, sheriffs, police departments, district attorneys, State Department of Justice, Federal Bureau of Investigation, and other interested agencies and persons. Case records shall also include a record of diagnostic findings, considerations, actions and dispositions with respect to classification, treatment, employment, training, and discipline as related to the institutional correctional program followed for each prisoner.

The director shall appoint, after consultation with the Adult Authority, such employees of the various institutions under his control as may be necessary for the proper performance of the duties of the Adult Authority, and when requested shall also have an attendance at hearings of the Adult Authority, psychiatric or medical personnel. The director shall furnish, after consultation with the Adult Authority and the Director of General Services, such hearing rooms and other physical facilities at such institutions as may be necessary for the proper performance of the duties of the Adult Authority.



**§ 3022. Notice of meeting to fix term**

At least 30 days before the Adult Authority shall meet to fix and determine the length of time any prisoner shall be confined, the authority shall send written notice thereof to each of the following persons who has made request therefor: the judge of the superior court before whom the prisoner was tried and convicted, the attorney for the defendant and the district attorney of the county from which the prisoner was sentenced and the law enforcement agency that investigated the case.

**§ 3042. Notice of parole meeting**

At least 30 days before the Adult Authority shall meet to consider the granting of a parole to any prisoner the authority shall send written notice thereof to the Director of Corrections and to each of the following persons who has made request therefor: the judge of the superior court before whom the prisoner was tried and convicted, the attorney for the defendant and the district attorney of the county from which the prisoner was sentenced and the law enforcement agency that investigated the case.

**§ 3046. Persons imprisoned under life sentence; minimum term; consideration of statements and recommendations; order**

No prisoner imprisoned under a life sentence may be paroled until he has served at least seven calendar years. The Adult Authority shall, in considering a parole for such prisoner, consider all statements and

recommendations which may have been submitted by the judge, district attorney, and sheriff, pursuant to Section 1203.01, or in response to notices given under Sections 3022 and 3042, and recommendations of other persons interested in the granting or denying of such parole. The authority shall enter on its order granting or denying parole to such prisoners, the fact that such statements and recommendations have been considered by it. Such statements and recommendations shall, however, be and remain confidential.

---

### CALIFORNIA GOVERNMENT CODE

**§ 6254. Exemption of particular records**

Except as provided in Section 6254.7 [relating to air pollution data], nothing in this chapter shall be construed to require disclosure of records that are:

(a) Preliminary drafts, notes, or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

* * *

(c) Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;

* * *

(f) Records of complaints to or investigations conducted by, or records of intelligence information or



security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;

* * *

(k) Records the disclosure of which is exempted or prohibited pursuant to provisions of federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.

* * *

**§ 6255. Justification for withholding of records**

The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

---

### CALIFORNIA EVIDENCE CODE

**§ 1040. Privilege for official information.** (a) As used in this section, "official information" means information acquired in confidence by a public employee in the course of his duty and not open, or officially disclosed, to the public prior to the time the claim of privilege is made.

(b) A public entity has a privilege to refuse to disclose official information, and to prevent another

from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and:

(1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or

(2) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice, but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the information be disclosed in the proceeding. In determining whether disclosure of the information is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered.

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AUG 10 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1975

## No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF RESPONDENTS JOHN VAN GELDERN, ET AL., REAL PARTIES IN INTEREST

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# In the Supreme Court
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OCTOBER TERM, 1975

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF RESPONDENTS JOHN VAN GELDERN, ET AL., REAL PARTIES IN INTEREST

### QUESTIONS PRESENTED

Pursuant to Rules 34 and 37, F. R. Civ. P., the District Court ordered defendants to produce certain documents for inspection by plaintiffs' counsel, subject to the terms of a protective order. Although defendants had resisted production on the ground that the documents were privileged, no claim of privilege was ever lodged by the Director of Corrections or by the Chairman of the Adult Authority; rather,

"petitioners' counsel merely raised a blanket objection covering any and all documents * * *" (App. 719). In denying defendants' petition for a writ of mandamus, the court below did not reach the question of whether the claimed privilege extends to the documents in issue, or if *in camera* inspection was necessary before allowing disclosure, holding only that "[t]he governmental privilege must be formally asserted and delineated in order to be raised properly." App. 717. The questions presented are:

1. Where a government agency objects to the production of documents pursuant to Rule 34, F.R. Civ. P., on the ground that they come within the qualified privilege for official information, is it an abuse of discretion for the District Court to require that the claim of privilege:

a. Be formally asserted by the head of the department which has control over the documents, after actual personal consideration by that officer;

b. Include a specific designation of the documents or class of documents at issue;

c. State with specificity the rationale of the claimed privilege; and

d. Describe the particular harm which is in fact likely to occur if the documents are inspected by counsel for the discovering party?

2. Where a government agency objects to the production of documents pursuant to Rule 34, F.R.Civ. P., on the ground that they come within the qualified privilege for official information, is it an abuse of discretion for the District Court to deny the agency's



request for *in camera* inspection of those documents if (a) the agency has failed to make the showing described in question 1, *supra,* and to show that such an inspection is feasible, or (b) the court correctly concluded that the need for the documents in the litigation outweighs the damage which is likely to result from their disclosure?

3. Whether, under all of the circumstances of this case, the District Court properly concluded that plaintiffs' need to inspect the documents in question outweighed the harm which defendants were likely to incur if such inspection took place in accordance with the protective provisions of the orders compelling discovery.

4. Whether a government agency has standing to assert, for itself or on behalf of unnamed individuals from whom it has received information, a Fourth Amendment privilege not to produce documents in response to a request therefor under Rule 34, F.R. Civ. P., where (a) no showing has been made with respect to who those individuals are, what information has been received from them, or what harm would come to them from the disclosure; (b) the individuals have voluntarily furnished the information to the agency; (c) the information is to be used by private parties in litigation against the agency; and (d) the trial court has concluded that the need for the documents in the litigation outweighs the damage which is likely to result from their disclosure.

## STATEMENT OF THE CASE

It is plaintiffs' submission that a proper resolution of this case depends upon an understanding of how the California Adult Authority—the state's parole board—operates in administering California's indeterminate sentencing law. Although the board's most visible function is the holding of hearings to determine whether to fix an inmate's term and grant parole, the board also performs an equally important function in adopting and modifying the sentencing and paroling policies which it will follow. Therefore in this opening statement of the case we shall first describe the manner in which the Adult Authority operates in setting policy and holding hearings, and thereafter summarize the complaint and the relevant events which occurred in the courts below.

### 1. How the Adult Authority Administers the California Indeterminate Sentencing Law.[1]

#### A. The California Indeterminate Sentencing Law.

In California, a trial judge may not set any specific term of imprisonment; instead, he is required (if

[1]Although the Adult Authority's procedures are constantly changing, authoritative descriptions of how that agency has operated during the past six years may be found in California Criminal Law Practice (Cont. Ed. Bar, 1969), Ch. 23, pp. 445-618 (written by a former member of the Adult Authority) [hereinafter referred to as "CEB"]; Parsons-Lewis, Due Process in Parole-Release Decisions, 60 Cal. L. Rev. 1518, 1521-37 (1972); and Note, California Department of Corrections and Adult Authority Decision-Making Procedures for Male Felons, 26 Stan. L. Rev. 1353, 1364-71 (1974). Effective March 1, 1975, some new criteria were promulgated by R. K. Procunier, recently appointed Chairman of the Adult Authority (see note 14, *infra*), which have been published in The State Bar of California, Report and Recommendations on Sentencing and Prison Reform (June 1975) at 89-102, and which are sometimes referred to hereinafter as the "Procunier System." In addition to the foregoing references, descriptions of how the board proceeds, in adopting policy and conducting hearings, are found in the depositions of various defendant Adult Authority members by plaintiffs' counsel which, although not contained in the Appendix filed in this Court, are part of the record in the District Court. These descriptions cover both the pre-March 1975 procedures as well as the Procunier System. The fact that a procedure once followed has since been modified is of limited significance, since it can be easily changed back overnight, either by a directive issued by the Chairman of the Adult Authority (see note 14, *infra*) or by adoption of an Adult Authority Resolution or Policy Statement, which under California law may be enacted without complying with the state's Administrative Procedure Act or any other statutory requirement (see note 7, *infra*).



imprisonment is to be imposed at all) to sentence the defendant to the term prescribed by law. See California Penal Code §1168 (West 1970). Most crimes in California carry minimum and maximum terms of great disparity (e.g., one year to life for molestation of a minor, *id.* §288; one to twenty-five years for kidnapping, *id.* §208), and it is within these ranges that the Adult Authority fixes the prison term that the inmate must actually serve. Penal Code §3020. However, maximum terms provided in the Penal Code bear little relation to the median terms actually served, since "the Adult Authority in the great majority of cases releases prisoners long before their maximum terms * * *." STATE OF CALIFORNIA, JOINT LEGISLATIVE COMM. FOR REVISION OF THE PENAL CODE, TENTATIVE DRAFT, No. 2, 17 (1968). Thus the judicial imposition of a life sentence, for example, "is no more than a legislatively mandated device for transferring the sentencing function from the State courts to the State administrative agency with a grant of jurisdiction over * * * [the inmate's] person for a period sufficiently long to enable the agency to perform its

functions under the State's indeterminate sentencing laws." *Sturm v. California Adult Authority*, 395 F.2d 446, 449 (9th Cir. 1967), *cert. denied*, 395 U.S. 947 (1968) (Browning, J., concurring).

**B. The Composition of the Adult Authority.**

The Adult Authority is composed of nine full-time members appointed by the governor. Penal Code §5075. Although Penal Code §5075 provides that "members shall be selected who have a varied and sympathetic interest in corrections work including persons widely experienced in the fields of corrections, sociology, law, law enforcement, and education," virtually every member of the present board is an ex-law enforcement or ex-correctional officer.[2] These members are assisted by so-called hearing representatives, who are appointed by the Chairman of the Adult Authority (deposition of defendant Kerr, January 9, 1973, [hereinafter referred to as the "Kerr Deposition"] at 8) and who perform virtually the same functions in conducting term-fixing hearings[3]

[2]See Mitford, Kind and Usual Punishment; The Prison Business (Alfred A. Knopf, 1973) 86; see also depositions of the following defendants, to wit: Kerr Depositions at 4; Ray C. Brown, June 11, 1974 at 4; Hoover, April 5, 1974 at 4-5; Lopez, June 20, 1974 at 4; Lynum, June 17, 1974 at 4; Rushen, May 2, 1975 at 4; Charles Brown, June 14, 1974 at 5; Procunier, May 15, 1975 at 3-4.

[3]Hearings are also held to determine whether or not to rescind or revoke parole. Although these hearings were the subject of plaintiffs' original complaint, plaintiffs' second amended complaint, filed July 1, 1975, is concerned solely with the term-fixing, parole-granting hearings discussed in the next subsection of this Statement of the Case. Therefore the remainder of this Statement, as well as the brief itself, will be limited to this type of hearing.



as do members, except that they are limited to making recommendations which must subsequently be approved by two members in order to be effective (*id.* at 8-9). In fact, recommendations of hearing representatives are almost always approved. Deposition of defendant Hoover, April 5, 1974, at 14-15; Kerr Deposition at 33.

**C. Term-Fixing, Parole Release Hearings.**

Whenever the Adult Authority fixes an inmate's term it virtually always grants parole at the same time, although it is under no legal obligation to do so. Defendants' Answer to Plaintiffs' Request for Admission of Facts and Genuineness of Documents, August 14, 1974 [hereinafter referred to as "Request for Admissions"] Statement and Answer No. 1. We shall, therefore, use the terms "term-fixing hearings" and "parole release hearings" interchangeably throughout this brief, since that usage accurately reflects the nature of the hearings which defendants conducted during all times material to this case.[4]

[4]However, in the recent case of *In re Rodriguez*, 14 Cal.3d 639, 537 P.2d 384 (1975), the California Supreme Court held that the Adult Authority must promptly fix a "primary term", which "must reflect the circumstances existing at the time of the offense." *Id.* at 652. Subsequently, the Adult Authority may conduct its usual determination as to whether or not to parole an inmate prior to the expiration of the primary term. At this writing, it is unclear whether the sentencing and paroling functions of the board will be performed at the same or separate hearings, although the Adult Authority will retain its full power to determine both issues. And in determining an inmate's readiness for parole, *Rodriguez* expressly affirms the Adult Authority's power to consider "a prisoner's good conduct in prison, his efforts toward rehabilitation, and his readiness to lead a crime-free life in society." *Id.* at 652.

Term-fixing hearings are generally conducted at the prison where the inmate is confined by a two-person panel of Adult Authority members and/or hearing representatives. Kerr Deposition at 12-14. These hearings are relatively short: plaintiffs have alleged that the median time is less than 10 minutes, and that decisions are reached quickly, "without any extended or meaningful discussion of the case." App. 10; see also Kerr Deposition at 27 (decision reached in 2 to 5 minutes); CEB at §25.133. The only written material which is before the panel are documents compiled from the inmate's central file, and in particular (1) information concerning the circumstances surrounding the commitment offense, (2) an individual diagnostic study prepared at the time the inmate was initially received by the California Department of Corrections (hereinafter referred to as the "CDC"), and (3) additional documents which reflect various aspects of the inmate's prison record. Kerr Deposition at 17-25; CEB §23.82 et seq. Usually the only person present during these hearings, apart from the panel members and the inmate, is a "correctional counselor" who acts as a clerk who attempts "to capture the essence of the interview, the man's demeanor and apparent attitude." Kerr Deposition at 15, 27. In most cases one panel member reads the next inmate's file while the other panel member conducts the interview with the inmate then in the hearing room. *Id.* at 18. At the end of the hearing, the panel members immediately decide whether or not to fix the inmate's term and grant parole, and then commence their interview with the next inmate on the list. *Id.* at 26-27.



There are no statutes or written regulations which set forth the criteria to be used in deciding whether or not to fix a term and/or grant parole. Defendant Edman's Response to Plaintiffs' Request for Admission of Facts and Genuineness of Documents (Second Set), No. 85, March 17, 1975. Similarly, there are no written rules of evidence or procedure which panel members must follow in conducting the hearings (deposition of defendant Gordon, June 14, 1974, at 20; deposition of defendant Ray Brown, June 11, 1974, at 21). Although inmates now have a limited right to review their central files prior to a hearing, departmental regulations permit prison caseworkers to withhold many documents from the inmates which, for a variety of reasons, are considered "confidential". App. 606-46. Inmates may not be represented at the hearing by any other person, including retained counsel, nor may they call or cross-examine witnesses, challenge any panel member for bias, or obtain a written transcript of the hearing. Deposition of defendant Hoover, April 5, 1974 at 65; Request for Admission, No. 135. Nor, as a practical matter, is the panel's decision subject to judicial review.[5]

So far as the result of these hearings is concerned, official CDC documents show that the percentage of paroles granted by the Adult Authority rose sharply from 30% to 50% in early 1970; rose sharply from 45% to 70% in late 1971; dropped sharply from 70% to 40% in late 1971 and early 1972; continued to drop until in May of 1973, "[f]or the first time in over

[5]See note 27, *infra*.

five years, fewer than 20% of the male felons heard by the Adult Authority received release dates." See Appendix A hereto. However, between January and March of 1975, with the change of Administrations, the appointment of a new Adult Authority Chairman and a consequent "change in policy," the percentage of release dates soared from 30% to 88%, "the highest ever." See Appendix B hereto.[6]

**D. Policy-Making Functions.**

State statutes are silent not only with respect to the criteria or procedures which are to govern Adult Authority hearings, but also as to how Adult Authority policies are to be adopted. Moreover, it has been expressly held that the Adult Authority, in adopting and promulgating its rules and regulations, is not subject to the California Administrative Procedure Act.[7] Therefore the Adult Authority is entirely free

[6]Appendix A is a memorandum written to the Director of Corrections and the Chairman of the Adult Authority by the Senior Statistician of the Department of Corrections, dated May 11, 1973, together with a graph which was annexed thereto as Chart 1. Appendix B is a similar memorandum dated April 23, 1973, together with a graph which was also attached as Chart 1 thereto.

[7]In *American Friends Service Committee v. Procunier*, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973), the court held that neither the Department of Corrections nor the Adult Authority is required to adopt or promulgate its rules or regulations in accordance with the California APA. Thus the so-called Resolutions and Policy Statements, which to some extent govern the Adult Authority, are adopted, modified, and revoked by a majority vote of each body for any reason or no reason at all (Deposition of defendant Kerr, dated January 22, 1973, at pp. 2-7). Moreover, sweeping changes in policy, resulting in a striking change in the rate of paroles granted (see Appendix B), have recently been promulgated solely by the Chairman of the Adult Authority. See note 14, *infra*.



to—and does—independently determine its own policies.

Some such policies are set forth in so-called "Policy Statements" or "Resolutions", which are adopted by a majority vote of the board and thereafter published. Deposition of defendant Kerr, January 22, 1973, at 2-7. Other policies, notably the new Procunier System, are set forth in directives issued by the Chairman of the Adult Authority. See note 14, *infra*. Other policy decisions, which are never promulgated in written form, are announced or adopted at secret executive meetings of the Adult Authority, which are held monthly in Sacramento. Still others—such as the policy forbidding an inmate to be represented by counsel—have simply been informally adopted over time. Kerr Deposition at 16-17. And although the official Resolutions and Policy Statements are available to the public, there is no such public access to decisions reached in executive sessions, or to directives contained in intra-agency memoranda, which are considered "confidential" by the Adult Authority. See App. 68; Defendants' Brief at 34-35.

**2. Summary of the Complaint.**

Plaintiffs are persons who, at the time the complaint was filed, were prisoners in custody of the CDC. On August 1, 1974, the District Court entered an order that the action is to be maintained as a class action under Rule 23(b)(2) F.R.Civ.P., on behalf of all prisoners and parolees in the custody of the Department of Corrections. App. 371, n. 1. Defendants in the District Court—who are the petitioners in this

Court—are the members and the Administrative Officer of the Adult Authority and the Director of the Department of Corrections.

In their complaint, plaintiffs allege that the hearing practices actually followed by the Adult Authority "are in fact completely lacking in both procedural and substantive due process, and in rudimentary fairness or equity," and that as a result of such defective procedures, the decisions routinely reached by the Adult Authority are "so arbitrary, discriminatory and otherwise illegal" as to violate plaintiffs' constitutional rights. App. 10-11. Specifically, plaintiffs allege that inmates are prohibited from reviewing their central files prior to the hearings (App. 10);[8] are not permitted to be represented by retained counsel (*ibid.*), and are not given written reasons for the decisions or the evidence relied upon (*ibid.*).[8] Plaintiffs further allege that the hearings themselves are defective because (i) the panel members do not have sufficient time to review the written material before them, to conduct a meaningful interview with the inmate, or to arrive at an informed decision (*id.* at 41); (ii) "many inmates are so fearful, tongue-tied or lacking in the ability to organize and articulate their position that they are unable to make an effective presentation of their case, or even on occasion

[8]Subsequent to the filing of plaintiffs' initial complaint, and in each case as the result of a judicial decision, defendants modified their procedures to give inmates (1) a limited right to view their central files (subject to the withholding of certain documents by the CDC as "confidential"), see *In re Olson*, 37 Cal.App.3d 783, 112 Cal.Rptr. 579 (1974), and (2) a written statement of reasons whenever parole was denied, see *In re Sturm*, 11 Cal.3d 258, 521 P.2d 97 (1974).



to respond accurately to questions posed by the panel" (*ibid.*); (iii) the written material relied upon by panel members is often false and misleading and is placed in an inmate's central file through a process which contains no substantial safeguards to determine reliability (*id.* at 40); and (iv) the Adult Authority members and representatives have no expertise in arriving at fair parole decisions, due to their narrow law-enforcement backgrounds, their rigid and stereotyped thinking patterns, and their punitive anti-prisoner biases (*id.* at 39-40). As a result of these and other defects in Adult Authority procedures, plaintiffs allege, *inter alia,* that the decisions reached and the actions taken by Adult Authority members and representatives are arbitrary and discriminatory and violate plaintiffs' rights to due process and equal protection guaranteed by the Fourteenth Amendment; their right to be free from cruel and unusual punishment, guaranteed by the Eighth Amendment; and their right to be represented by counsel at the time of sentencing, guaranteed by the Sixth Amendment (*id.* at 42-45). They therefore seek declaratory and injunctive relief, asking the District Court to declare the Adult Authority procedures unconstitutional and to issue an injunction which will surround the term-fixing, parole release hearings with basic due process safeguards, including the right to counsel.

### 3. Proceedings in the District Court and the Court Below.

#### A. Documents Maintained by the Adult Authority.[9]

In June of 1973 plaintiffs moved for the production of various documents maintained by the Adult Authority (App. 51), including all of those which were at issue in the court below and which are described in the Appendix at page 711 n. 5. Initially, defendants simply refused to file answers or objections until, in response to a motion filed by plaintiffs, the District Court expressly ordered them to do so. Order of the Disrict Court entered on November 15, 1973. Thereafter, defendants filed objections to virtually all of the documents requested (App. 57-75), although no claim of privilege was ever filed by the Chairman of the Adult Authority or the Director of Corrections (App. 718); no designation or description of the documents involved was ever supplied (*id.* at 719); nor was any evidentiary showing ever made with respect to the specific harm which was likely to occur as a result of the inspection.

Plaintiffs' Rule 37 motion to compel production of these documents was initially referred to United States Magistrate David R. Urdan, who conducted a full hearing on the matter before entering his findings and recommendations. Petition for Writs of Certiorari, App. pp. xviii-xxii. Magistrate Urdan recommended, *inter alia,* (1) that defendants produce all of the documents requested, *id.* at xix, and (2) that a

[9]This subsection of respondents' Statement of the Case corresponds to pp. 17-21 of defendants' brief, which also discusses the events in the courts below with respect to these particular documents. The nature and relevancy of the documents themselves are discussed more fully at pages 70-73, *infra.*



protective order be entered, prohibiting plaintiffs' counsel from showing any Adult Authority personnel files to anyone other than personnel employed in their offices, "and then only to the extent necessary to the conduct of the litigation," *id.* at xix-xx.[10] After conducting another hearing on the matter, District Judge Stanley A. Weigel modified and, as modified, adopted the Magistrate's Findings and Recommendations as the order of the court. In doing so he extended the protective order to limit review of the Adult Authority personnel files to "counsel of record for the plaintiffs and no more than a total of two investigators designated by such counsel, and then only to the extent necessary to the conduct of this action." *Id.* at xvi. Judge Weigel also denied defendants' request for an *in camera* inspection of the documents in question.

Defendants then petitioned the court below for a writ of mandamus, which eventuated in that court's order and opinion of January 17, 1975, which is reported at 511 F.2d 192 (9th Cir. 1975) (App. 707-720). In its order, the court below recognized the qualified privilege for official information, but declined "to reach the question of whether this privilege extends to these documents or if a further protective order in the nature of *in camera* inspection is necessary before allowing disclosure." App. at 717. Instead, it held that the privilege itself had not been properly lodged by the head of the department which had control over the documents, after personal con-

[10]Although this protective provision, subsequently adopted as the order of the court, covers only the personnel files, plaintiffs would not object to an order extending it to the other documents here at issue.

sideration by him. Such a claim, the court held, requires the officer to designate which documents are privileged and to "state with specificity the rationale of the claimed privilege." App. 718. Since no such claim had ever been lodged in the District Court—petitioners having filed only a "blanket objection covering any and all documents" (App. 719)—the court denied the petition. It noted, however, that "[s]ince there may be information in the requested documents which should be protected, the petitioners may assert a privilege to a particular document or class of documents, and perhaps seek *in camera* inspection, at the time the documents are discovered in the District Court." App. 719.

**B. Inmates' Central Files.**[11]

In order to prove, *inter alia,* their allegations that inmate central files are inaccurate and misleading, as well as to locate and prepare inmate witnesses for trial, plaintiffs moved for the production of every twentieth inmate file maintained by the CDC. App. 234-35. When defendants refused to produce the files, plaintiffs moved for an order compelling production which was initially considered by Magistrate Urdan who, after conducting a hearing on the matter, concluded that

> "[f]rom all that appears in the files of this case and from all I have heard at discovery motion

[11]This subsection of plaintiffs' Statement of the Case corresponds to pp. 11-17 of defendants' brief, which discusses the events in the courts below with respect to the inmates' central files. The nature and relevance of these central files are discussed more fully at pages 68-70, *infra*.



> hearings, the conduct of the Adult Authority hearings and the manner in which they are held, together with information in inmate files are, perhaps, the most relevant matters that might tend to support the plaintiffs' claims, are directly relevant and material to the subject of the litigation and are discoverable." Petition for Writs of Certiorari, App., p. xl.

However, his recommendation for production was limited to 200 files, "subject to a protective order that would restrict examination and inspection of inmate files to attorneys for plaintiffs and for their use only in connection with this lawsuit." *Ibid.*

Defendants again sought a review of the magistrate's findings and recommendations in the District Court, whereupon Judge Weigel conducted yet another hearing and—by order dated August 12, 1974—modified and adopted those recommendations. *Id.* at xxix-xxxiii. However, when plaintiffs' counsel attempted to inspect the first set of central files pursuant to the order, counsel for defendants authorized his clients to (1) withhold documents which various prison officials had designated as "confidential" and (2) forbid plaintiffs' counsel to photocopy any of the documents inspected. App. 460-61. Although defendants, at page 13 of their opening brief, state that "[e]ach document withheld was identified in writing, *as was the reason for withholding it*" (emphasis supplied), a mere reading of the cited portion of the Appendix (pp. 502-24) shows that, in most instances, no reason whatsoever was given.

Consequently, plaintiffs were required to return to the District Court with a motion for enforcement, clarification, and sanctions (App. 446-62), which led eventually, after several intermediary proceedings (see defendants' brief at 14-16), to the District Court's order of December 3, 1974 (App. 647-50). That order, which incorporates by reference the court's order of August 12, 1974, also provides, *inter alia,* (1) that the central files shall be produced without any material deleted therefrom; (2) that plaintiffs may photocopy these files; (3) that plaintiffs' attorneys may be assisted, in their inspection, by no more than two persons who shall be attorneys or certified law students and who shall be certified by plaintiffs' attorneys; (4) that no such file shall be inspected or copied unless plaintiffs' counsel shall have obtained, in advance, written consent from the inmate subject of the file; (5) that plaintiffs' attorneys shall not make any use of said photocopies, nor permit inspection thereof, except as necessary for acquittal of their duties of representation in this case"; and (6) that plaintiffs' attorneys are "charged with protecting the confidentiality of the contents of all of the files or portions of the files inspected and/or copies by them and/or their assistants." *Id.* at xxv-xxviii. Defendants thereupon petitioned for a writ of mandamus in the court below, which was denied. App. 699.



## SUMMARY OF ARGUMENT

The privilege for official information, which defendants here assert, is both limited and qualified. It is *limited* because many documents which a government agency considers "confidential," such as those which contain factual material or "secret law," do not come within its ambit. And it is *qualified* because documents which do come within its scope—generally intra-agency memoranda of a policy-making nature—must nonetheless be produced pursuant to Rule 34 if the discovering party's need for their use in the litigation outweighs the damage which would be caused by their disclosure. Therefore defendants' insistence that there is a qualified privilege for all "confidential" government documents—which recurs throughout their opening brief—constitutes a serious misstatement of the law.

Under the Federal Rules of Civil Procedure, the burden is on the party asserting a privilege to show that he is entitled to it, and to base that showing "on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." 8 Wright & Miller, *Federal Practice and Procedure* (1970 ed.) § 2035 at 265. However, "[n]either the Chairman of the Authority nor the Director of Corrections nor any official of these agencies asserted, in person or writing, any privilege in the District Court" (App. 718) (opinion of the court below). Nor did defendants or their counsel ever designate "which documents or class of documents are privileged and for what reasons" *(ibid.)* or "state

with specificity the rationale of the claimed privilege" (*id.* at 718). Nor did they even attempt to show what specific harm was *in fact* likely to result from plaintiffs' counsel inspecting the documents in question, subject to the limitations of the protective orders entered by the District Court. Rather, "petitioners' counsel merely raised a blanket objection covering any and all documents * * *" (*id.* at 719), which in their view obligated the District Court either to sustain the privilege or to conduct its own *in camera* inspection of the documents.

However, this Court and the lower federal courts have consistently held that the privilege for official information must be claimed by "the head of the department which has actual control over the matter, after actual personal consideration by that officer." *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953). Such a requirement operates to insure that the claim of privilege is not "lightly invoked", *ibid.*, but rather represents a considered policy decision that production of the documents would be contrary to the public interest. It also enables the court to understand the nature of the potential harm which disclosure could cause and to determine what type of protective order, if any, might mitigate such harm.

In addition, the cases have consistently required a party claiming the privilege to designate the documents involved; to describe why they come within the privilege; to spell out the harm which is likely to occur if they are disclosed; and to support these assertions with an evidentiary showing. Such a showing is necessary in order to determine (1) whether various documents or portions thereof fall entirely outside the privilege (because, e.g., they consist of factual material) or (2) whether the public interest requires that those documents which do come within the privilege ought nonetheless to be disclosed in the litigation. Yet this Court will search the record in vain to find even an attempt by defendants, in the District Court, to make such a showing. Therefore the narrow holding of the court below—that "[t]he governmental privilege must be formally asserted and delineated in order to be raised properly" (App. at 717)—was clearly correct.



Defendants also insist that the District Court had a legal obligation to conduct an *in camera* inspection of the documents before ordering their disclosure. However, any *in camera* inspection seriously undermines the adversary process, gravely prejudices the discovering party, places a great burden on both trial and appellate courts, and is likely to produce an uninformed and therefore erroneous decision. Consequently the lower federal courts are now requiring a party seeking *in camera* inspection to make the type of specific and detailed presentation which will minimize these problems and will also disclose whether or not such an inspection is feasible. Since defendants utterly failed to make such a showing—insisting instead that the District Court was obligated to inspect however many documents are involved—the court below properly declined to decide whether "*in camera* inspection was necessary before allowing disclosure." App. 717. In fact, defendants

are still entitled to "seek *in camera* inspection, at the time the documents are discovered in the District Court." App. at 719.

The opinion of the court below may also be affirmed on the ground that the discovery orders of the District Court were clearly correct. "The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute." *Black v. Sheraton Corporation of America,* 371 F. Supp. 97, 100 (D.D.C. 1974). In this case the documents are highly relevant to the subject matter of the litigation, are reasonably calculated to lead to the discovery of admissible evidence, and would prove useful to such other legitimate purposes as the cross-examination of adverse witnesses. By comparison, the harm which defendants would in fact incur if the documents are inspected pursuant to the protective orders entered by the District Court—and which defendants have never spelled out—is likely to be minimal.

But in addition to a comparison of the competing needs for disclosure and confidentiality, there are strong policy reasons which militate in favor of disclosure in this case. *First*, there is the need to guard against excessive government secrecy, whose object is not to protect the public interest but rather the self-serving interests of the bureaucracy itself. *Second,* disclosure is especially appropriate where, as here, plaintiffs attack not the correctness of an agency decision (e.g., the length of a particular sentence), but



rather the procedures themselves under which criminal sentencing is conducted in California. *Third,* this is not a case in which an individual plaintiff seeks essentially personal gain, but rather a class action brought under the Civil Rights Act where plaintiffs act in the capacity of "private attorneys general" to determine the constitutionality of the procedures followed by the state's parole board. *Fourth,* plaintiffs are here litigating against an agency which has unlimited access to the very documents which it is withholding from plaintiffs, and which it can be expected to use to its considerable advantage at trial. Under these circumstances, the limited discovery ordered by the District Court was manifestly correct, and on this ground alone the decision of the court below could properly be affirmed.

Defendants' Fourth Amendment argument is entirely without merit. That amendment, which was designed to protect individual citizens from government intrusion, has no application to the discovery of documents from the government for use against the government in civil litigation. Nor may the government here assert the Fourth Amendment rights of individuals who have voluntarily furnished information to the government, since they do not have the type of interest, and do not suffer the sort of harm, which the Amendment contemplates. Furthermore, defendants utterly failed to show, in the District Court, who such individuals are; what sort of information has been received from them; what reasonable expectations of privacy, if any, they have; or what harm would come to them from the disclosure ordered

by the court. Finally, the fact that the District Court's discovery orders are correct as a matter of law forecloses any claim that they violate a citizen's right to be free from *unreasonable* searches and seizures.

In the court below defendants were seeking, by way of mandamus, to overturn interlocutory orders of a nonappealable nature. However, defendants failed to show that there had been a "judicial usurpation of power", *Will v. United States,* 389 U.S. 90, 95 (1967); that their right to the issuance of the writ was "clear and indisputable", *id.* at 96; or that they would suffer the type of hardship that justifies resort to mandamus. "Thus the most that can be claimed on the record is that * * * [the District Court] may have erred in matters within his jurisdiction," *id.* at 103-04, and the "extraordinary writs do not reach to such cases * * *." *Ibid.* Plaintiffs therefore ask this Court to affirm the decision of the court below, either for the reasons set forth in its opinion or on the ground that the underlying discovery orders of the District Court are correct and should be complied with by defendants.



## ARGUMENT

### I

### THE COURT BELOW PROPERLY HELD THAT DEFENDANTS FAILED TO MAKE AN ADEQUATE SHOWING THAT THE DOCUMENTS HERE IN QUESTION ARE PROTECTED BY THE QUALIFIED PRIVILEGE FOR OFFICIAL INFORMATION, OR THAT AN IN CAMERA INSPECTION BY THE DISTRICT COURT WAS REQUIRED.

#### A. THE PRIVILEGE FOR OFFICIAL INFORMATION IS BOTH LIMITED AND QUALIFIED

As the court below correctly held, and as defendants now concede, the only privilege arguably applicable to the documents here in question is the qualified privilege for official information.[12] Throughout their brief, however, defendants make the fundamental error of confusing the concept of "confidentiality" with that of privilege, as if the two are somehow interchangeable.[13]

[12]See App. 717 (opinion below). In the District Court and in the court below, defendants rested their claim of privilege primarily upon (1) California Evidence Code §1040 and California Government Code §6254 (which sets forth the exceptions to the California Public Records Act) and (2) certain exceptions to the Federal Freedom of Information Act (5 U.S.C. §552 *et seq.*). The court below, however, held that these provisions do not create privileges for litigants in federal questions cases (App. 714-17), and defendants do not challenge that holding in this Court. It should also be noted that the holding of the court below, that state privileges do not apply in federal question cases, has been effectively adopted and superceded by Rule 501, Federal Rules of Evidence, which became effective on July 1, 1975. At any rate, defendants now claim only the qualified privilege for official information (see, e.g., Defendants' Brief at 27, 47).

[13]In their Summary of Argument, defendants assert that "the federal courts recognize a qualified privilege to protect confidential documents from unnecessary disclosure" (Defendants' Brief at 27). Thereafter, defendants consistently make reference to, e.g., the "compelled production of confidential documents" (*id.* at 28); "[t]he qualified privilege of non-disclosure of confidential documents" (*id.* at 29); "the compelled disclosure of confidential government documents" (*ibid.*); "documents whose apparent confidentiality clearly outweighed any apparent need of plaintiffs for them" (*id.* at 32); "[t]he confidentiality of portions of the contents of inmate files" (*id.* at 33); and so forth.

Yet the courts have never adopted any "general principle that makes information otherwise discoverable privileged because it was given in confidence." 4 Moore's *Federal Practice* (1974 ed.), ¶26.61 [4.-3] at 26-276. As Judge Prettyman once put it,

> "There is a vast difference between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But privileged means that the contents are of a character that the law as a matter of public policy protects them against disclosure. * * * That the documents are merely confidential does not protect them against compulsory disclosure." *Communist Party of the United States of America v. Subversive Activities Control Board,* 254 F.2d 314, 321 (D.C. Cir. 1958).

In fact, the privilege for official information is, as we shall show, a relatively narrow one which is both limited and qualified. Generally speaking, it applies to intra-agency documents of a confidential nature if, but only if (1) they express opinions or recommendations for use in the decision-making process; (2) their disclosure would harm the consultative functions of government; and (3) the harm resulting from their disclosure outweighs a litigant's need for their production in order to arrive at a just resolution of a legal dispute. See pages 31-33, *infra*. Thus the privilege is *limited* insofar as many intra-agency documents of a confidential nature do not fall within the scope of the privilege at all, and must routinely be disclosed in discovery. And the privilege is *qualified* insofar as



other intra-agency documents which do fall within the scope of the privilege must nonetheless be disclosed in discovery where the litigant's need for them outweighs the damage caused by their disclosure. Since these two concepts are essential to a proper understanding of this case generally—and in particular to an understanding of defendants' failure to make an adequate showing of privilege in the District Court—we shall discuss each briefly in the following pages.

**1. The Official Information Privilege Is Limited.**

A reading of the federal cases discloses that there are many different types of written material contained in government files, much of it considered to be "confidential", which is not privileged and is routinely available through discovery to a party litigating against an agency. Perhaps the three such categories of material which are most frequently identified are those which contain (1) factual data or investigative reports, (2) advisory opinions which are subsequently adopted as agency policy, and (3) "secret law".

**a. Factual Data and Investigative Reports.**

This Court has held that intra-agency memoranda "consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government." *EPA v. Mink,* 410 U.S. 73, 87-88 (1973), and cases cited at n. 14. Moreover, the concept of "factual data" generally includes investigative reports, which are also subject to discovery. See, e.g.,

*Grumman Aircraft Engineer Corp. v. Renegotiation Board,* 425 F.2d 578, 582 (D.C. Cir. 1970); *Boeing Airplane Co. v. Coggeshell,* 280 F.2d 654 (D.C. Cir. 1960). The reason for the rule is that disclosure of such material does not usually impair those "consultative functions of government which the privilege of nondisclosure protects." *EPA v. Mink, supra,* 410 U.S. at 87. In this case many of the documents in question are likely to contain such factual information as the average length of parole hearings; the percentage of paroles granted each month; the average length of time taken to prepare psychiatric or pre-Board reports; the names of inmates who have served more than 20 years without parole; and so forth. Under the law, none of this information—or any other material of a similar nature—would come within the privilege.

**b. Memoranda Which Form the Basis for, or Which Explain, an Agency Decision.**

Frequently suggestions which are initially contained in decision-making memoranda are subsequently adopted by the agency, either as its official policy or as an explanation of the agency's decision. "In such cases this court has required disclosure of the memoranda, for, once adopted as a rationale for a decision, the memorandum becomes part of the public record." *Montrose Chemical Corporation of California v. Train,* 491 F.2d 63, 70 (D.C. Cir. 1974), and cases cited. Similarly, where an agency, "as a matter of convenience," simply utilized the last five pages of a memorandum as its own findings and determinations, "the memorandum lost its intra-agency status and became a public



record, one which must be disclosed to appellants." *American Mail Line, Ltd. v. Gulick,* 411 F.2d 696, 703 (D.C. Cir. 1969). In the case at bar plaintiffs requested memoranda which pertain to official Policy Statements or Resolutions issued by the Adult Authority; "all documents which concern the Adult Authority's adoption of new policies, procedures, criteria and the like;" and in particular all documents relating to Adult Authority Policy Statement No. 24, which set forth revised policies governing the fixing of terms. See App. 711-12 n. 5. Under the cases cited above, all suggestions contained in those memoranda which have subsequently been adopted as agency policy fall entirely outside the limited privilege and must be disclosed.

**c. Documents Which Constitute "Secret Law".**

"It is well established that information which either creates or provides a way of determining the extent of substantive rights and liabilities constitutes a form of law that cannot be withheld from the public." *Cuneo v. Schlesinger,* 484 F.2d 1086, 1091 n. 13 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974), and cases cited; see also *General Services Administration v. Benson,* 415 F.2d 878, 881 (9th Cir. 1969); *Ash Grove Cement Company v. FTC,* 371 F. Supp. 370, 374-75 (D.D.C. 1973). Such information, often referred to as "secret law," *Cuneo v. Schlesinger, supra,* 484 F.2d at 1091, consists not only of material which is directive in nature but also that which consists of "interpretations of rules and statutes or guidelines * * *." *Id.* at 1090. As we explain more fully at

pages 61-65, *infra*, it is difficult to imagine an agency whose operations are surrounded by more secrecy than those of the Adult Authority, which applies at closed hearings policy which it has adopted at private meetings. Therefore plaintiffs requested production of all memoranda written by the Chairman of the Adult Authority for the past five years, many of which almost certainly contain directives to be followed by members in conducting term-fixing, parole release hearings.[14] As one court recently observed, in an FOIA case where plaintiffs sought directives by the FTC Commission to its staff, "if any of the documents sought demonstrate the existence of 'secret law', it would appear in the Commission's directives to its staff and/or communications of policy between the Commission and its staff." *Ash Grove Cement Co. v. F.T.C.*, 371 F. Supp. 370, 374-75 (D.D.C. 1973). Therefore, although these documents are considered "confidential" by defendants, all portions thereof which contain such directives simply are not privileged.

Finally, it is clear that material which is not privileged (because, e.g., factual in nature) may not be withheld merely because it is contained in a memorandum which also contains privileged material. *EPA v. Mink, supra.* In such a situation, it is the obligation of the party upon whom the discovery request was

[14]See, e.g., California Adult Authority Chairman's Directive 75/20, dated April 15, 1975, issued by Chairman Procunier, establishing entirely new parole hearing procedures, and Chairman's Directive No. 75/17, dated April 2, 1975, also issued by Chairman Procunier, which establishes an appeals procedure. See also the memorandum dated February 5, 1971, from defendant Kerr, former Adult Authority Chairman, which is reproduced as Appendix C hereto.



served to separate the privileged material and produce it for copying and inspection. *Cuneo v. Schlesinger, supra; Vaughn v. Rosen,* 484 F.2d 820 (D.C. Cir. 1973), *cert. denied* 415 U.S. 977 (1974). Although the foregoing principles are by now well settled, defendants nowhere acknowledge that there are many "confidential" documents which simply do not come within any privilege whatsoever. Instead, they have consistently assumed that *all* government documents, so long as they are considered "confidential" by the agency, must be considered privileged unless the need for their disclosure outweighs the harm caused thereby. See Note 2, *supra.* Perhaps this failure helps to explain, although it certainly cannot justify, defendants' failure to make the requisite showing of privilege in the District Court.

**2. The Official Information Privilege Is Qualified.**

In his recent review of executive privilege, Professor Archibald Cox observed that

> "[a]ll the cases that face the question treat the privilege as incomplete. All of the cases hold or assume that the court should decide in each particular case whether the need for the evidence in the administration of justice outweighs the value of confidentiality as an encouragement to candor." Cox, *Executive Privilege,* 122 U. Pa. L. Rev. 1383, 1416 (1974).

See, e.g., *United States v. Nixon,* 418 U.S. 683 (1974); *Nixon v. Sirica,* 487 F.2d 700 (D.C. Cir. 1973); *Carr v. Monroe Manufacturing Co.,* 431 F.2d 384 (5th Cir. 1970), *cert. denied* 400 U.S. 1000 (1970); *Olson Rug*

*Company v. NLRB*, 291 F.2d 655 (7th Cir. 1961); *Black v. Sheraton Corporation of America*, 371 F. Supp. 97 (D.D.C. 1974); *Amchen Products, Inc. v. GAF Corp.*, 64 F.R.D. 550 (N.D. Ga. 1974); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C. 1966), *aff'd* 384 F.2d 979 (D.C. Cir. 1967), *cert. denied* 389 U.S. 952 (1967) [hereinafter referred to as *Carl Zeiss*]. "Each case, we believe, obviously must turn on its own facts; a blanket executive privilege is simply unknown to American law." *In re Midwest Monopolization Litigation*, 60 F.R.D. 12, 17 (W.D. Mo. 1973).

Therefore a determination that an intra-agency memorandum is of an advisory nature marks the beginning, not the end, of a judicial determination with respect to whether it is to be withheld from a discovering party as privileged. Essentially, such a determination

> "requires a delicate balancing of competing interests: the public's interest in preserving confidentiality to promote open communication necessary for an orderly functioning of the government, and the individual's need for disclosure of particular information. The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute." *Black v. Sheraton Corporation of America, supra*, 371 F. Supp. at 100.

This was the holding of the court below (App. 717), and this is the position taken by defendants in their opening brief (see, e.g., pp. 27, 47). Therefore all



parties are in agreement that *if* an intra-agency document is of a policy-making or advisory nature, the trial court must determine "whether the damage resulting from disclosure outweighs the need for the just resolution of a legal dispute." *Black v. Sheraton Corporation of America, supra*, 371 F. Supp. at 100. We turn, therefore, to a discussion of whether defendants made, in the District Court, the sort of showing which is required in order to invoke this privilege.

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**B. DEFENDANTS MADE NO SHOWING WHATSOEVER IN THE DISTRICT COURT THAT THESE DOCUMENTS ARE PRIVILEGED.**

Under the Federal Rules of Civil Procedure, the burden is on the party asserting a privilege to show that he is entitled to it. 8 Wright & Miller, *Federal Practice and Procedure* (1970), §2016 at 126, and cases cited. This is true regardless of whether the privilege is invoked in response to interrogatories served under Rule 33 *(id.*, §2173 at 542-43, and cases cited), a request for production of documents under Rule 34 *(id.*, §§2214 at 644; 4A Moore's *Federal Practice*, ¶34.05 [3] at 34-38), or a subpoena *duces tecum* under Rule 45 (9 Wright & Miller, *supra*, §2457 at 435). Similarly, a resisting party who seeks a protective order under Rule 26(c) must also show "some plainly adequate reason therefor." 8 Wright & Miller, *supra*, §2035 at 264-65.

Traditionally, a *valid* claim of privilege must be asserted by the head of the department involved, after personal consideration by that officer. The claim must

be properly delineated, which "should involve specifying which documents or classes of documents are privileged, and for what reasons * * *." App. 714. And the showing must be factual and evidentiary in nature, rather than a mere conclusory assertion that the privilege obtains. That these requirements are well settled in the law has never been disputed by defendants, either in the court below or in their opening brief in this Court. Yet as we shall now show, defendants never even *attempted* to satisfy any one of these requirements, and on this narrow ground the court below necessarily held that they had failed to properly invoke the privilege.

**1. The Legal Requirements.**

**a. The Privilege for Official Information Must Be Formally Asserted by the Head of the Department.**

This Court has said that the privilege for official information belongs to the government and must be asserted by it, adding that

> "[i]t is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer." *United States v. Reynolds,* 345 U.S. 1, 7-8 (1953).

"While *Reynolds* involved military secrets, subsequent decisions have uniformly applied the guidelines it expressed irrespective of the particular kind of executive claim advanced." *Carl Zeiss, supra,* 40 F.R.D. at 326-27 n. 33, and cases cited. See also, *United States v. Nixon, supra; General Services Administration v. Benson, supra,* 415 F.2d at 879; *Carr v. Monroe Manufacturing Co., supra,* 431 F.2d at 387; *Amchen Products, Inc. v. GAF Corp., supra.* The same rule has been applied where a state agency has asserted the privilege, *Carr v. Monroe Manufacturing Co., supra,* and no reason appears why the result should be otherwise.[15]



We do not, however, rest our position solely on the unbroken line of authority cited above, since there are at least three strong policy reasons why any claim of governmental privilege should be asserted by the agency head, "after actual personal consideration by that officer." *First,* such a requirement would help to insure that the privilege is not "lightly invoked." Such a concern is of considerable importance inasmuch as the effect of the privilege is to deny to a litigant and to the court material which is relevant (and perhaps even crucial) to a fair determination

[15]Defendants cite no authority whatsoever to the contrary, but simply argue that this case is distinguishable from *Reynolds* (no attempt is made to distinguish any of the other cases) because here (i) only a qualified privilege was "ultimately" asserted, (ii) the privilege was asserted by counsel for a *party* to the action, (iii) "the *confidentiality* of the documents was obvious from their description * * * " (emphasis supplied), and (iv) plaintiffs' need for the documents was "dubious on its face" (Defendants' Brief at 43). In the following paragraphs we shall show why, as a matter of policy, the requirement of assertion by the agency head is a salutary one, even where a qualified privilege is asserted by a party to the litigation. Defendants' point (iii) is meaningless, since what is *not* "obvious from their description" is whether the documents are *privileged;* that they may be considered "confidential" by the agency is, as we have shown above, legally irrelevant. And it is simply inaccurate to say that plaintiffs' need for the documents was "dubious on its face", since the United States Magistrate, the District Court, and the court below all held, after conducting hearings on the matter, that they were relevant to the subject matter of the litigation in the District Court. See also pages 61-73, *infra.*

of a lawsuit. Obviously, the more diffuse the authority for invoking the privilege the more likely it is that use of the privilege will unduly proliferate.

*Second,* the requirement would help to insure that assertion of the privilege represents *considered* agency policy, rather than the *ad hoc* views of assorted middle-echelon functionaries, whose decisions are more likely to represent conflicting, subjective, or perhaps even self-serving interests. In a similar vein, the ABA Special Committee on Federal Practice and Procedure concluded that "if the privilege is to be claimed, it should be done by a high level of authority and not by some Assistant United States Attorney, way down on the bottom of the totem pole." Hearings on Proposed Rules before Special Subcommittee of Federal Criminal Laws, Committee on the Judiciary, House of Representatives, 93d Cong., 1st Sess. on Proposed Rules of Evidence, Serial No. 2 (Supplement), p. 118 [hereinafter referred to as Hearings on Proposed Rules]. Moreover, the District Court needs to know, not what harm might *conceivably* result from disclosure, but rather the precise nature of the harm to the public interest which the agency head in fact perceives. Such information is crucial, not only because it materially aids the court in striking a fair balance between the competing claims of confidentiality and disclosure, but also because it may enable the trial court to determine whether (and if so, what sort of) a protective order could effectively cure or ameliorate the harm which disclosure might cause.



*Third,* it is important to acknowledge the divergence of interests, priorities and obligations which exist between an agency's chief, on the one hand, and its attorney, on the other.

> "Given the strong federal preference for complete disclosure, a blanket assertion of the privilege without specificity by the attorneys who are going to try the matter is not adequate. * * * *It is not appropriate for attorneys who are this close to the matter and who, by the nature of the adversary system, have a vested interest in the outcome, to decide whether or not relevant material should be privileged.* For this reason the material which might otherwise be eligible for nondisclosure because of executive privilege must be produced unless the privilege is properly claimed by the appropriate agency head." *Thill Securities Corp. v. New York Stock Exchange,* 57 F.R.D. 133, 138 (E.D. Wisc. 1972) (emphasis supplied).

Thus it has been noted that "the lawyers who litigate the case for the department not infrequently are as set on winning at all costs as counsel for a private litigant." Berger & Krash, *Government Immunity From Discovery,* 59 Yale L. J. 1451, 1464 (1950). It is clear that any adverse effect upon the agency's chances of success in the lawsuit are not to be considered in deciding whether the "public interest" will be injured if the documents are produced. Yet that is likely to be the foremost (and perhaps the only) concern of the agency's attorney, whose position in the litigation may be greatly enhanced—as it has been in this case in the District Court—if the privilege is

upheld.[16] Therefore we submit that this Court should decline defendants' invitation to discard the rule, consistently followed in the federal courts, that the qualified privilege for official information must be invoked by the agency head, "after personal consideration by that officer."

**b. Assertion of the Privilege for Official Information Must be Supported by a Description of the Documents and by an Evidentiary Showing That the Privilege Applies.**

The court below held that formally claiming a privilege "should involve specifying which documents or class of documents are privileged and for what reasons, especially where the nature of the requested documents does not reveal an obviously privileged matter." App. 719. This modest requirement is plainly a reasonable one, and has been insisted upon by virtually every court which has passed on the matter. Perhaps the best statement of this requirement and its rationale was given by Judge Richey in *Black v. Sheraton Corporation of America, supra,* 371 F. Supp. at 101 (D.D.C. 1974):

[16]Most of the documents here at issue were initially requested, pursuant to Rule 34, F.R.Civ.P., in June of 1973. App. 51-56. However, due to defendants' resistance to producing these documents in the District Court, the court below, and in this Court, together with the stays of the discovery orders issued (and subsequently vacated) by the court below, and by this Court, plaintiffs to this date have never inspected these documents, and it now appears that they will have to go to trial without them. Hence it is plain that, entirely apart from whether or not the "public interest" is served by preserving their confidentiality, defendants and their counsel have greatly enhanced their position in the litigation in the District Court by interposing various claims of privilege which, although they have been consistently rejected, have nonetheless deprived their adversary of many crucial documents which are, at the same time, available to counsel for defendants.



> "A formal and proper claim of executive privilege requires a specific designation and description of the documents within its scope as well as precise and certain reasons for preserving their confidentiality. (Citations omitted.) Without this specificity, it is impossible for a court to analyze the claim short of disclosure of the very things sought to be protected. (Citation omitted.) As the affidavit now stands, the Court has little more than its *sua sponte* speculation with which to weigh the applicability of the claim. An improperly asserted claim of privilege is no claim of privilege. (Citations omitted.) Therefore, despite the fact that a claim was made by the proper executive as *Reynolds* requires, the Court cannot recognize the claim in the instant case because it is legally insufficient to allow the Court to make a just and reasonable determination as to its applicability. To recognize such a broad claim in which the Defendant has given no precise or compelling reasons to shield these documents from outside scrutiny, would make a farce of the whole procedure."

See also 8 Wright & Miller, *supra,* §2035 at 265; 9 *id.* at 435; *Pacific Architects & Eng., Inc. v. Renegotiation Board,* 505 F. 2d 383 (D.C. Cir. 1974); *Communist Party of the United States of America v. Subversive Activities Control Board, supra,* 254 F. 2d at 321; *Pleasant Hill Bank v. United States,* 58 F.R.D. 97, 101 (W.D. Mo. 1973).

But in addition to "a specific designation and description of the documents" and "precise and certain reasons for preserving their confidentiality," *Black v. Sheraton Corporation of America, supra,* the courts

"have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." 8 Wright & Miller, *supra,* §2035 at 265. Thus claims of governmental privilege have been rejected where "[n]o factual allegations as to privilege have been made," *Communist Party of the United States of America v. Subversive Activities Control Board, supra,* 254 F.2d at 321, or where the agency involved "did not present any evidence to the court on this issue," *Gill v. Manual,* 488 F.2d 799, 803 (9th Cir. 1973).[17] Compare *United States v. United Fruit Co.,* 410 F.2d 553, 557 n. 11 (5th Cir. 1969), *cert. denied* 396 U.S. 820 (1969), "where the party seeking the protective order by affidavit presented numerous specific examples of harm which would result if the information sought was disclosed." *Essex Wyre Corp. v. Eastern Elec. Sales Co.,* 48 F.R.D. 308, 311 n. 1 (E.D. Pa. 1969). In any event, the courts have consistently required the showing to "be based upon appropriate testimony and other factual data, not the unsupported contentions and conclusions of

[17]The type of "detailed justification" which an agency invoking the privilege for official information could and should make is helpfully analyzed in *Pacific Architects & Eng., Inc. v. Renegotiation Board, supra,* 505 F.2d at 385. In that case the court held that the agency's showing should include (i) the extent to which data of the sort in dispute is customarily disclosed to the public; (ii) the extent to which disclosure of the information will impair the government's ability to obtain necessary information of this type in the future; (iii) the extent to which disclosure of the information will cause substantial harm to the person from whom the information is obtained; and (iv) the extent to which any harm of the type so mentioned could be reduced or eliminated by nondisclosure of the identity of the person submitting the information in dispute. In addition, the court made it clear that the resisting party must also submit "specific factual evidentiary material to support the conclusions reached • • •." *Ibid.*



counsel," *Apco Oil Corp. v. Certified Transp., Inc.,* 46 F.R.D. 428, 432 (W.D. Mo. 1969), or "an unsupported claim made only in the brief here that the doctrines of privilege apply," *Communist Party of the United States of America v. Subversive Activities Control Board, supra,* 254 F.2d at 321. *Accord:* 8 Wright & Miller, *supra,* §2035 at 265 n. 23, and accompanying text.

**2. Defendants' "Showing" in the District Court.**

Defendants, in the District Court, did not even attempt to satisfy a single one of these requirements.[18] No claim of privilege was ever submitted by any official of the Adult Authority or the Department of Corrections; rather, all such claims were made by defendants' counsel or by various, middle-echelon corrections officials at various prisons throughout the state. See note 19, *infra,* and App. 268-72; 499-524. Thus a great many documents were withheld from the central files of two of the named plaintiffs by a "records officer," because they were "classified as confidential within the State Department of Corrections." App. 271-72. And many other documents were removed from inmate central files by various "correctional counselors" and other undesignated officials before they were produced for inspection by plaintiffs' counsel.[19] Thus it is really not apparent, for present purposes, "who the individual exercising that judg-

[18]See generally App. 57-75; 147-196; 220-231; 247-260; 287-293.

[19]See App. 502-524. Each of these pages consists of a form which states that a particular CDC official has "reviewed the file of the above-named person and have authorized the withholding of the listed material from examination by the named person or

ment may have been." *In re Midwest Milk Monopolization Litigation, supra,* 60 F.R.D. at 14.

Nor is there any description of the documents involved, or of the class of documents, or any explanation as to why they are even considered to be "confidential." In fact, the standards which the CDC officials claim to have relied upon in determining whether documents are "confidential" (App. 499-500), which are contained in the Department's inmate records procedures, are so expansive as to bear no resemblance to the narrowly defined privilege for intra-office memoranda recognized by the courts. *Compare* App. 625-29 *with* the discussion at pages 31-33, *supra.* And, to the extent that defendants' counsel made the decisions, it is not unlikely that they were acutely aware of the significant advantage which they would obtain from persistently resisting discovery at all stages of this litigation. See note 16, *supra.*

Thus the fundamental information which a court would need to have is nowhere to be found in this

the person's attorney." Although counsel for defendants has seen fit to utilize the phrase "/s/ [CDC Official]", a review of the original documents would disclose that they are signed by many different officials stationed at various prisons throughout the state, some of whom are correctional counselors ("CCI" or "CCIII"); for others, no title is listed. Although these counselors were at one time required to hold graduate degrees, that is no longer required, and many counselors are ex-guards. "Already, the Department estimates that more than 40 percent of its counselors are not even college graduates • • •. [T]he Department has felt pressure to make promotions available to the large number of correctional officiers with no other place to go." SENATE SELECT COMM. ON PENAL INSTITUTIONS, UPGRADING CORRECTIONAL MANPOWER: A REPORT TO THE CALIFORNIA LEGISLATURE, pt. I, at 20 (April, 1972). Since these officials are neither lawyers nor policy makers, they bring no expertise to bear upon, nor are they even in a position to understand, the issue of whether or not material should be kept from a party litigating against the agency.



record. For example, are intra-office memoranda of an advisory nature involved? If so, were any later relied upon as the rationale for an agency decision? Were any simply adopted and thereafter utilized as the agency's decision? Do any of them explain or interpret official policy? Do any of them contain "secret law"? Was material in certain documents given in exchange for an express promise of confidentiality? Does certain material come from informers whose names must be withheld? Have the documents or any portions thereof previously been made public by the government? Is the allegedly privileged material severable from that which is admittedly non-privileged? This Court will search the entire record in vain for any submission by defendants, in the District Court or in the court below, which even addresses itself in any meaningful way to these or similar questions. Indeed, defendants' statement to the effect that "each document withheld" from certain inmate central files inspected by plaintiffs' counsel "was identified in writing as was the reason for withholding it" (Defendants' Brief at 13), is demonstrably false, as a mere reading of App. 502-24 will quickly show. Instead, there is a continuing series of conclusionary references to these documents as being "confidential," an approach which defendants have continued to utilize in their opening brief in this Court.

Finally, there is no description of the specific harm which would *in fact* be likely to occur if these documents were disclosed *to plaintiffs' counsel pursuant to the protective orders issued by the District Court.*

Rather, defendants have been satisfied to simply recite in their briefs the *general* interests which a state typically has in maintaining the confidentiality of agency documents. See, e.g., App. 173, 277 n. 2, 228; Defendants' Brief at 33-35. However, the protective order issued by the District Court permits inspection of an inmate's central file only after he has given his consent; limits inspection to plaintiffs' counsel and two assistants; and enjoins plaintiffs' counsel to use the material only in connection with the lawsuit and to preserve its confidentiality. It is our submission that unless plaintiffs' counsel were to disobey this order, *no harm whatsoever* would *in fact* result from the disclosure ordered. In any event, it was defendants' obligation to furnish "specific examples of the harm which would result if the information sought was disclosed," *Essex Wyre Corp. v. Eastern Elec. Sales Co., supra,* 48 F.R.D. at 311 n. 1, and this they never even attempted.

Instead, defendants' counsel merely waved a wand over any and all of the (still undesignated) documents which are covered by plaintiffs' request and intoned the magic word: "privileged!" This manifestly inadequate response was correctly rejected by the court below, which held only that if defendants wish to claim the privilege for official information it must be "formally asserted and delineated in order to be raised properly." App. 717. Indeed, the court went on to hold that "[s]ince there may be information in the requested documents which should be protected, the petitioner may assert a privilege to a particular document or a class of documents, and



perhaps seek *in camera* inspection, at the time the documents are discovered in the District Court." *Ibid.* For this Court to overturn that decision would, in effect, grant a license to all agency attorneys to routinely interpose blanket claims of privilege, couched in conclusory terms, covering all of the documents sought by a discovering party, which would then have to be given conclusive effect by the District Court. This, we submit, simply is not and, more importantly, should not be the law.

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### C. DEFENDANTS' SHOWING IN THE DISTRICT COURT WAS INADEQUATE TO REQUIRE THESE DOCUMENTS TO BE INSPECTED IN CAMERA.

In their opening brief in this Court, defendants have placed primary reliance upon their claim that the District Court was legally *required* to conduct an *in camera* inspection of all documents for which defendants had interposed their conclusory claim of "confidentiality." They argue that this refusal was, without more, a violation of the Federal Rules of Civil Procedure and the Fourth Amendment. Yet once again defendants did not attempt, in the District Court, to make even the minimal showing which would have enabled that court to conduct a fair and meaningful *in camera* inspection or, for that matter, even to determine whether such an inspection was feasible. For this reason alone—as well as for the reasons previously discussed and those set forth in Section II, *infra*—the court below was clearly correct in denying defendants' petition for mandamus, al-

though even in so doing it has left the door open for a subsequent *in camera* inspection should defendants, on remand, invoke the privilege in a proper way.

There are two basic problems necessarily inherent in every *in camera* inspection of allegedly privileged documents. The first is that it all but eliminates the adversary nature of the proceedings, resulting in considerable unfairness to the discovering party. The second is that it places a tremendous burden on the judiciary at both the trial and appellate levels, which those courts are ill equipped to handle. As we shall see, these two concerns are inter-related and effectively reinforce each other in a way which is most advantageous to a government agency resisting discovery, and most unfair to a discovering party seeking production of relevant documents for use in litigation against the agency.

Perhaps the most considered judicial discussion of these two problems is to be found in the seminal case of *Vaughn v. Rosen, supra.*[20] There Judge Wilkey, writing for a unanimous panel,[21] noted that "[i]n a

[20]Although *Vaughn* is a Freedom of Information Act case, the considerations which the court discusses are equally applicable to *in camera* inspections of documents sought by a discovering party under Rule 34, F.R.Civ.P. Most of the FOIA cases cited herein were decided by the D.C. Circuit, "because over half of the FOIA appeals are handled by that court." Note, *Vaughn v. Rosen*: Toward True Freedom of Information, 122 U. Pa. L. Rev. 731, 741 (1974). "The D.C. Circuit had decided 9 of the 17 FOIA appeals through early 1972. See FOIA REPORT, *supra*, Note 1, at 70-71. Subsequent experience reflects, if anything, an increase in this proportion." *Id.* at 741 n. 55.

[21]Another one of the panel members was Judge Robinson, who as a District Court judge was the author of *Carl Zeiss, supra*, a decision which is much relied upon in the area of governmental privilege.



very real sense, only one side to the controversy (the side opposing disclosure) is in a position confidently to make statements categorizing information * * *. Obviously the party seeking disclosure cannot know the precise contents of the documents sought; secret information is, by definition, unknown to the party seeking disclosure." *Id.* at 823-24.

> "This lack of knowledge by the party seeking disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution. Ordinarily, the facts relevant to a dispute are more or less equally available to adverse parties. In a case arising under the FOIA this is not true, as we have noted, and hence the typical process of dispute resolution is impossible. In an effort to compensate, the trial court, as the trier of fact, may and often does examine the document *in camera* to determine whether the Government has properly characterized the information as exempt. Such an examination, however, may be very burdensome, and is necessarily conducted without benefit of criticism and illumination by a party with the actual interest in forcing disclosure." *Id.* at 824-25.

See also *Cuneo v. Schlesinger, supra,* 484 F.2d at 1091-92; *Nixon v. Sirica, supra.*

In fact, the adverse impact on the adversary process is much greater where, as in the case at bar, it is a party to litigation—rather than a member of the public generally—who seeks an allegedly privileged document from the agency for use in litigation with the agency itself. Under the FOIA, the court

is not to consider the needs of the applicant or the relevance of the document to the subject matter of any pending litigation, nor is it required to balance the need for disclosure against the need for preserving confidentiality. Rather, it must simply determine whether or not the document is of a type enumerated in one of the nine exceptions to the FOIA (see 5 U.S.C. § 552). *Id.* at 823. Thus the essential task of the court is to test the accuracy of the characterization given the allegedly exempt material by the government, although even this task is "compounded by the fact that the entire document is not exempt merely because an isolated portion need not be disclosed," *id.* at 825, and the court must therefore undertake to separate the exempt from the non-exempt.

But where, as here, a private party seeks the production of documents for use in litigation against the agency, the impact of the agency characterization—with consequent unfairness to the discovering party—increases greatly. As the court below pointed out, a document can be relevant under Rule 26 not only if it constitutes evidence for use at trial, but also if it "'appears reasonably calculated to lead to the discovery of admissible evidence'" or if it could be used for the cross-examination of adverse witnesses (App. 714, and cases cited). But the problem is that the District Court simply does not and cannot know, at the discovery stage of litigation, crucial facts which in combination will often determine not only whether a document is relevant but also whether it is privileged since, in cases such as the one at bar, the court



must balance a plaintiff's need for the document against the harm which disclosure would bring. Manifestly the court cannot know, at this stage, such crucial facts as the discovering party's intended trial tactics; the witnesses and other evidence which he intends to use at trial; the contents of depositions already taken; the answers to interrogatories and requests for admission already obtained; the contents of documents previously discovered; the nature of crucial evidence which the party is still attempting to locate; or the adverse witnesses who are likely to be used by either or both parties at trial. As a result, the court usually *cannot* know, regardless of how painstaking and conscientious an *in camera* inspection it conducts, whether a particular document will itself be admissible at trial (because, e.g., it furnishes the foundation for testimony which an expert witness intends to give); whether it will lead to admissible evidence; or whether it will be useful to impeach the testimony of an adverse witness. This Court has itself recognized, in a similar context involving a potential *in camera* inspection of grand jury minutes, that it would be difficult for even the most able trial judge to pick out all of the testimony which would be useful in impeaching a witness at trial.

> "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and

> effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process * * *." *Dennis v. United States,* 384 U.S. 855, 874-75 (1965).

See also, *Natta v. Zletz,* 405 F.2d 99 (7th Cir. 1968), *cert. denied* 395 U.S. 909 (1968), where the Seventh Circuit followed the quoted language in a civil case, recognizing that only the discovering party was in a position to recognize what would be useful to the presentation of its case.

By way of example, one of plaintiffs' counsel had seen, purely by chance during a prison visit, a memorandum written by a high-ranking CDC official which reads in part as follows:

> "Some inmates become tongue-tied or emotionally involved, and during the course of the interview forget what they really wish to discuss with the Board." (App. 78-79; full text of document at App. 421-22.)

This statement is virtually identical to one of the allegations contained in plaintiffs' complaint (App. 41), and therefore it plainly (1) will be admissible at trial; (2) is reasonably calculated to lead to admissible evidence (e.g., through an interview with the author of the memorandum); and (3) is admissible to impeach defendant Kerr, former chairman of the Adult Authority, who had testified in deposition—and will presumably so testify at trial—that inmates *do not* have a hard time articulating their thoughts,



or become unduly tongue-tied at these hearings.[22] Nevertheless, defendants initially objected to producing the document as irrelevant (App. 60), and although a trial judge *might* have picked this one sentence out of the memorandum (the rest of the document is rather innocuous) as relevant to the allegations in the complaint, there was absolutely no way he could have known, without a submission by plaintiffs (who in the ordinary case would not know the contents of the document), what was in the Kerr deposition, and therefore that the document was directly relevant for purposes of cross-examination. See *United States v. Meyer,* 398 F.2d 66, 72 (9th Cir. 1968). Thus even the most rigorous *in camera* inspection still results in a situation involving "half-informed litigants who sometimes get justice, if at all,

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[22]"Q. Isn't it true, Mr. Kerr, that a large number or large percentage of inmates are very scared and nervous at these hearings?
A. I would assume that most of them are under some tension.
Q. Yes. But beyond that, isn't there a large percentage of them that really have a difficult time organizing and articulating their thoughts at the time?
A. No, I wouldn't say so.
Q. Let me ask you this, Mr. Kerr. Do you think this is a fair statement: Some inmates become tongue-tied or emotionally involved and during the course of the interview forget what they really desire to discuss with the Board?
A. I would have no way of knowing.
Q. From five years on conducting interviews you have no feel of whether that statement is probably true or not?
A. It is such a general statement that I would have no way of knowing.
Q. Has it been your experience that some inmates become tongue-tied at these hearings?
A. No.
Q. None?
A. I don't recall a single one that was so tongue-tied he couldn't express himself." App. 94-95.

by accident * * *." *Timken Roller Bearing Co. v. United States,* 38 F.R.D. 57, 63-65 (N.D. Ohio 1964).

Four additional considerations demonstrate that the usual *in camera* procedures cause far more harm to a party litigating against the agency than to the typical plaintiff in a FOIA action. The first is that in litigation the trial court can greatly diminish, and perhaps entirely eliminate, any genuine harm from disclosure by issuing exactly the sort of protective orders which were issued in the District Court in this case; and on this important matter plaintiffs should be able to suggest ways in which this could be done. Secondly, unlike FOIA situations where a single party usually seeks information for personal ends,[23] this case is being maintained as a class action by the named plaintiffs who, under the Civil Rights Act, serve the public interest as "private attorneys general" in challenging the constitutionality of the parole procedures in California. See *Wood v. Brier,* 54 F.R.D. 7, 10-11 (E.D. Wisc. 1972). "Thus, it is of special import that suits brought under this statute be resolved by a determination of the truth rather than by a determination that the truth shall remain hidden." *Id.* at 11.

Third, it is of crucial importance to recognize that counsel for defendants have access to *all* of the disputed documents, as well as the central files of *all*

[23] "Of 40 FOIA cases brought from the effective date of the Act in 1967 through March, 1969, 37 involved actions by corporations or private parties seeking information relating to personal claims or benefits. (Citation omitted.) Of 55 cases over a longer period, only 6 could be termed 'public interest' (citation omitted)." Note, Recent Cases, 87 Harvard L. Rev. 854, 863-64 n. 68 (1974).



inmates in the California prison system, and all other documents maintained by the Adult Authority and the CDC. The unfairness of permitting only one party to a lawsuit to have access to such crucial evidence—a situation which does not exist under the FOIA—needs no elaboration. See generally, 8 Wright & Miller, *supra,* §2019 at 173, and cases cited at n. 30; *Carl Zeiss, supra,* 40 F.R.D. at 329, and cases cited.

Fourth, it is important to note that each *in camera* presentation by an agency resisting discovery gives one party to the litigation an opportunity to present to the court material which may be and often is highly prejudicial to the other party, and which bears not only upon the issue of discovery but upon the substantive issues of the case itself. Thus every *in camera* inspection affords one party, out of the presence of the other, an opportunity to make its case to the judge, thereby further weakening the adversary process and increasing the likelihood that the court will arrive at an erroneous decision.

Accordingly, it is our submission that the *in camera* inspection, which on its face (and in defendants' brief) appears to be such a reasonable and equitable device, is more often just the opposite. By emasculating the adversary process, it enables one party to make a comprehensive and authoritative presentation of its position while at the same time entirely foreclosing the other party from making even an informed guess as to the basic documents around which the dispute centers. Yet it simultaneously imparts a false sense of certainty that documents have been

rejected because they are in fact irrelevant or privileged which is, if anything, more insidious than a candid acknowledgment that the court has given conclusive weight to the government's self-serving characterization of its own documents.

But if such *in camera* procedures are extremely unfair to the discovering party, they are also extremely burdensome to the courts. Although the burden in some cases may be relatively light, in others there may be "hundreds or even thousands of pages" which could take a judge days or weeks to examine. *Vaughn v. Rosen, supra,* 484 F.2d at 825. In addition, an appellate court will often have to conduct yet a second inquiry, one which it is even "less suited to making * * * than is a trial court"; yet "if justice is to be done, the examination must be relatively comprehensive." *Id.* at 825. And "to the extent that the number of facts in dispute are increased, the efficiency of the court system involved in that dispute resolution will be decreased." *Id.* at 826.

As a result, for a court to sustain the tactic employed by defendants in the District Court—i.e., the submission of a blanket claim of privilege combined with a demand for *in camera* inspection, based upon nothing more than a conclusory claim of "confidentiality"—actually "*encourages* the Government to contend that large masses of information are exempt [or, as here, privileged], when in fact part of the information should be disclosed." *Id.* at 826. This is true because, first, there is no incentive for the agency to disclose: "[a]t most they will be put to a court test stacked in



their favor, the burden of which can be easily shifted to another by simply averring that the information * * * [is privileged]." *Id.* at 826. And secondly, once "the morass of material is so great that court review becomes impossible, there is a possibility that an agency could simply point to selected, clearly exempt portions, ignore the discloseable sections, and persuade the court that the entire mass is exempt." *Ibid.*

In the District Court, defendants entirely failed to accompany their demand for *in camera* inspection with any sort of analysis which would have aided the District Court in (1) deciding whether such an inspection was feasible or (2) conducting such an inspection in an informed and efficient manner. As noted earlier, the privilege itself was never invoked by any agency head, after personal examination, but rather by an Assistant Attorney General and by various middle-echelon CDC staff members, partly on the basis of criteria quite different from those which constitute the qualified privilege for official information. No designation or description of the documents for which the privilege is claimed was ever attempted, and to this day no one even knows how many documents are involved. Nor, of course, was there any attempt at separating privileged from non-privileged matter, or any indexing of the documents in order to relate the allegedly privileged material to the privilege itself. Nor was any attempt made to specify the precise harm which might occur from disclosure under the terms of the protective order. Accordingly, it was entirely proper for the District Court to deny defend-

ants' demand for *in camera* inspection, and it is significant that defendants do not cite a single case in support of their argument to the contrary.

Even so, the court below expressly left open the possibility that defendants may still "seek *in camera* inspection, at the time the documents are discovered in the disrict court." App. at 719. That being so, and because this Court has not heretofore considered this issue in any detail,[24] we shall now submit our recommendations for the type of showing which should be required of a party which requests a district court to conduct an *in camera* inspection of allegedly privileged documents.

*First,* the privilege should be formally asserted by the head of the agency involved, after personal consideration by that officer, as held by the court below. See pages 34-38, *supra.*

*Second,* as the court below also held, the claim of privilege should involve a description of the specific documents involved, and a division of the documents into privileged and non-privileged segments. *Vaughn v. Rosen, supra; Nixon v. Sirica, supra.*

*Third,* there should be a detailed statement of the reasons why the allegedly privileged segments come within the qualified privilege for official

[24] See *EPA v. Mink, supra,* where the Court referred to the submission, by an agency, of "detailed affidavits or oral testimony" to support a claimed exemption under the FOIA. The court's discussion in *Vaughn* was intended to elaborate upon the suggestions contained in the *Mink* opinion. 484 F.2d at 824.



information, together with an evidentiary showing that this is so. *Vaughn v. Rosen, supra; Cuneo v. Schlesinger, supra; Pacific Architects & Eng., Inc. v. Renegotiation Board, supra.*

*Fourth,* there should be a detailed statement of the specific harm which, in the opinion of the agency head, would *in fact* be caused if the allegedly privileged segments were produced, together with an evidentiary hearing showing that this is so. *Vaughn v. Rosen, supra; Pacific Architects & Eng., Inc. v. Renegotiation Board, supra.*

*Fifth,* the agency should submit an index which will subdivide each allegedly privileged document into manageable portions, cross-referenced to the relevant part of the Government's justification. *Vaughn v. Rosen, supra; Cuneo v. Schlesinger, supra; Nixon v. Sirica, supra.*

All of these procedures must now be routinely followed, at least in the D.C. Circuit, for cases arising under the FOIA where an agency seeks to avoid disclosure under one of the Act's exemptions.

It is our position, however, for reasons set forth at pages 47-54, *supra,* that such requirements should be far more rigorous in cases involving the production of documents under Rule 34, F. R. Civ. P., for purposes of litigation against the withholding agency, than those required of an agency claiming an exemption under the FOIA. Therefore we suggest that in such cases at least one counsel for the discovering party be permitted to view, in chambers, the material

which the resisting agency claims to be irrelevant or privileged. Such counsel, who should not at this stage have the right to photocopy the material, would be allowed to make his inspection for the sole purpose of permitting him to show the District Court why the material is in fact relevant and not privileged, and could be ordered not to disclose or otherwise use the material for any other purpose. Such a showing could be made, for example, by reference to other evidence to be adduced at trial; by the utility which the material has for the cross-examination and impeachment of adverse witnesses; or by reference to the discovering party's theory of the case. So far as privilege is concerned, counsel could point out (1) that the allegedly privileged material is in fact comprised, at least in part, of factual material, investigatory reports, intra-agency material which was subsequently adopted as agency policy, or documents which constitute "secret law", and which is severable from the admittedly privileged material; (2) that even as to material which falls within the qualified privilege, his clients' need for the material in the litigation outweighs the likely harm of disclosure; and (3) that any harm to the public interest which might arise from disclosure could be eliminated or significantly reduced by the entry of a particular protective order. Such a showing could be made at a hearing, to be held in chambers, at which both sides would be able to make an informed presentation, following which the court could itself make an informed decision without the expenditure of an undue amount of judicial time.



Adoption of a procedure such as that described in the preceding paragraph would, of course, undermine to some extent the value of the privilege. However this is precisely the procedure contemplated by the court in *Nixon v. Sirica, supra,* in which it was suggested that the Special Prosecutor might be afforded "access to the material for the limited purpose of aiding the Court in determining the relevance of the material to the grand jury's investigations." 487 F.2d at 721. Moreover, if the inspection is limited to one counsel who is sworn to secrecy by order of the court, the harm *in fact* caused by the disclosure is quite likely to be far less than that caused by the alternative of keeping the discovering party in ignorance of the contents of the documents (as to which opposing counsel have unlimited access), and requiring the trial court to make its own time-consuming inspection "without benefit of criticism and illumination by a party with the actual interest in forcing disclosure." *Vaughn v. Rosen, supra,* 484 F.2d at 825. Stated differently, no one claims that the government "should be required to 'operate in a fishbowl', but by the same token we do not feel that * * * [the discovering party] should be required to operate in a darkroom." *American Mail Line Ltd. v. Gulick, supra,* 411 F.2d at 703.

In any event, it is clear that defendants entirely failed to make the sort of showing which would have enabled the District Court to determine whether or not an *in camera* inspection was necessary or feasible, or to conduct such an inspection in a meaningful way.

Yet even so the court below has not foreclosed defendants from making such a showing upon the remand of this case. Therefore if this Court reaches the issue, we submit that it should require any party seeking an *in camera* inspection pursuant to Rule 34 to make the type of showing outlined above, and should require the District Court to give counsel for the discovering party a limited opportunity to view the material in order to protect his client's rights and to assist the court in arriving at an informed decision.

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## II

**THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DISCOVERY BECAUSE PLAINTIFFS' NEED TO INSPECT THESE DOCUMENTS IN THIS CASE CLEARLY OUTWEIGHS ANY HARM WHICH DEFENDANTS ARE IN FACT LIKELY TO INCUR.**

In the preceding section of this brief, plaintiffs have defended the rather modest holding of the court below, to the effect that defendants did not properly assert or delineate the qualified privilege which they sought to invoke. Yet the underlying discovery orders issued by the District Court may also be upheld on the ground that plaintiffs' need for the documents in question clearly outweighs any real harm that defendants are likely to incur, especially in view of the carefully drawn protective orders under which they are to be produced. Although this question was not reached by the court below (App. 717), it was fully briefed in that court and in the District Court, and would



therefore properly form the basis of a decision by this Court affirming the decision of the court below. *Jaffke v. Dunham,* 352 U.S. 280 (1957); *Dessar v. Bank of America,* 353 F.2d 468 (9th Cir. 1965).

"The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for a just resolution of a legal dispute." *Black v. Sheraton Corporation of America, supra,* 371 F. Supp. at 100. We shall, therefore, discuss first plaintiffs' need for these documents; next, the harm that defendants might incur if they were to be produced; and finally, the several policy reasons why, in the special circumstances of this case, production is clearly warranted.

We have already outlined the dual role of the Adult Authority in (1) adopting and changing fundamental sentencing policies and goals, as well as criteria and procedures to be applied in fixing terms and granting paroles, and (2) conducting the term-fixing, parole determination hearings. These two activities, although separate, are intimately related, and an understanding of this interrelationship is crucial to a proper resolution of this case. For although defendants, in their brief, focus almost entirely upon the hearings, it is our submission that some of the most egregious and unlawful aspects of the system relate to the making of what is in effect "secret law." Thus we find that in 1971 a decision is made, in secret, to "get tough" and sharply decrease the number of paroles granted. See Appendix A. In 1975, however, with the advent of a new Administration in Sacramento and a newly ap-

pointed Chairman of the Adult Authority, another decision is made, again in secret, to "loosen up" and sharply increase the number of paroles granted. See Appendix B. And so the percentage of parole dates given out fluctuates wildly from one year to the next, based upon secret decisions which, in plaintiffs' view, are at best arbitrary and at worst the result of legally impermissible influences.[25]

Certainly it is not difficult to identify many legally impermissible factors which the documents here in issue may disclose. For example, what if the documents were to show that secret decisions have been reached, pursuant to which (1) Adult Authority members automatically ratify all recommendations by hearing representatives; (2) each member has been assigned a quota of paroles to be granted at each prison; (3) conclusive weight is to be given to the parole recommendations of each inmate's prison counselor; (4) all inmates suspected of belonging to the Black Muslim sect are to be denied parole; (5) no inmate is to be paroled until he admits guilt; (6) additional time is to be required of each inmate who did not plead guilty; or (7) extra time is to be given for crimes of which the inmate had been acquitted at trial, or which had been dismissed as the result of a plea bargain? What if, as we think likely, the documents show that many fundamental policy decisions emanate from the office of the state governor or other political leaders, and are made for such reasons as cutting costs (by lowering the prison population), or striking a "law and order" image (by raising it)? *Cf.* Appendices A and B. Such examples could, of course, easily be multiplied, but the point should already be clear: that if illegal policies, secretly adopted, determine the actions of the Adult Authority officials at the term-fixing hearings, plaintiffs cannot adequately prove the invalidity of the system without proving what these policies are, and how they affect individual term-fixing decisions.

As a California Assembly Report on the Adult Authority once observed, "[t]he parole board is one of the last bastions of unchecked and arbitrary power in America." California Assembly, Select Committee on the Administration of Justice, Parole Board Re-

[25] Although judicial review of sentences imposed by federal courts is limited, appellate courts have long recognized "the implicit distinction between review of the merits of a sentence and review of the procedure leading to the sentence." Note, Appellate Review of Sentencing Procedure, 74 Yale L. J. 379, 382 (1964). Thus federal courts have vacated sentences where a judge has "given substantial consideration to legally impermissible factors." *Marano v. United States*, 374 F.2d 583, 586 (1st Cir. 1967). See *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *North Carolina v. Pearce*, 395 U.S. 711, 726 (1968); *Scott v. United States*, 419 F.2d 264, 266 (D.C. Cir. 1969); *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). Among such legally impermissible factors are the refusal of a defendant to admit guilt at the time of sentencing, *Scott v. United States, supra; Thomas v. United States, supra;* the refusal of a defendant to plead guilty rather than to insist upon standing trial, *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960); the use of illegally obtained evidence, *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968), *cert. denied* 397 U.S. 925 (1969); the belief by the sentencing judge that defendant had committed an additional crime for which he had not been tried, *Scott v. United States, supra;* and the use of facts erroneously considered by the sentencing judge to be "aggravating circumstances," *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967), *rev'd. on other grounds*, 391 U.S. 367 (1968).

form in California: Order Out Of Chaos 115 (1970). In this regard, the difference between the clearly delineated and severely limited power given to members of the judiciary, on the one hand, and the virtually unlimited discretion given to members of the Adult Authority, on the other, is instructive. Judges, who all have considerable legal training, are bound by strict rules of procedure and evidence, not of their own making; mediate between opposing parties represented by competent counsel; function in open court, with all exchanges on the record; are limited to imposing (in criminal cases) a prison sentence "prescribed by law;" and are subject to judicial review of all significant actions. Similarly, most administrative agencies which hold adjudicative hearings are bound by rules which must be adopted and promulgated under some type of Administrative Procedure Act; permit interested parties to be heard through counsel and to obtain a full record of the proceedings; and are subject to effective judicial review. By contrast, Adult Authority members and hearing representatives, most of whom have no legal training whatsoever (but instead are ex-law enforcement or ex-correctional officers), make up their own rules, and in doing so are not even subject to the California Administrative Procedure Act;[26] do not permit counsel to appear at the hearings which they conduct; have the power to make many inmates serve an entire lifetime in prison; make no transcript of their proceedings, which are for the most part held entirely in secret; and are subject to

[26]See note 7, *supra*.



no effective judicial review.[27] These powers, unknown to any other area of the law, have been termed by one commentator as "the most important anomaly in California criminal procedure." Johnson, "Multiple Punishment and Consecutive Sentences: Reflections on the *Neal* Doctrine," 58 Cal. L. Rev. 357, 390 (1970).

Thus plaintiffs' need for the documents here at issue —in order to prove, at trial, that the Adult Authority procedures in question are unconstitutional—must be viewed in light of the fact that (1) the Adult Authority is vested with virtually unlimited and unprecedented discretion in performing what is clearly the sentencing function of the criminal process; (2) the Adult Authority, unlike almost every other comparable agency, operates entirely in secret (whether it is adopting its policies in secret meetings or applying

[27]It is occasionally said, usually in a court decision denying due process rights, that any individual case involving an illegal parole determination may be challenged by habeas corpus in a state court. See, e.g., *Dorado v. Kerr*, 454 F.2d 892, 898 (9th Cir. 1972), *cert. denied* 409 U.S. 846 (1972). And in fact habeas corpus does lie in California to challenge such a determination. See, e.g., *In re Rodriguez*, 14 Cal. 3d 639, 537 P.2d 384 (1975). Yet *in fact* such decisions are almost entirely limited to a few cases in which an appellate court wishes to announce or modify fundamental principles of law, as in *Rodriguez*. Indeed, as of 1972, one commentator found that "*no court* has found the authorities' cause so meager as to warrant upsetting a denial of parole." Parsons-Lewis, Due Process in Parole-Release Decisions, 60 California L. Rev. 1518, 1525 n. 44 (1972) (emphasis supplied). See also *In re Rodriguez*, *supra*, 14 Cal. 3d at 650 n. 15. This is understandable for many reasons, not the least of which is the fact that no record is made at the Adult Authority hearings which a court could review. Beyond that, "[t]he discretion lodged in the authority is so broad that it is seldom that case can be made out that would show an abuse of that discretion." *Azeria v. California Adult Authority*, 193 Cal. App. 2d 1, 5, 13 Cal. Rptr. 839, 842 (1961). Therefore as a practical matter it is quite accurate to say that the more than 20,000 individual decisions made annually by the Adult Authority are in fact subject to no judicial review.

them in secret hearings); and (3) renders decisions which require California prisoners to serve literally thousands of years in prison, yet which are subject to no effective judicial review. Moreover, plaintiffs' proof, as may readily be seen from the complaint (App. 39-45), must be highly specific in nature, since plaintiffs must *prove* that Adult Authority members in fact have no expertise; that in fact policy decisions are adopted and prison terms are imposed for legally impermissible reasons; that Board members in fact rely upon material in the central files which is meaningless or inaccurate; that they have an inadequate amount of time to conduct the hearings, which are themselves ineffective to develop the basis upon which a rational parole decision can be made; and that these infirmities, in combination, constitute a constitutionally impermissible system of sentencing.[28] Thus it is against this burden of proof that we examine

[28]Plaintiffs have deliberately chosen to undertake such an extensive factual showing because previous attacks on parole boards, raising pure issues of law and producing paper records, have generally been unsuccessful. See, e.g., *Dorado v. Kerr, supra.* It is plaintiffs' view that such lawsuits do not succeed because they (1) require courts to make crucial assumptions about the facts here in issue which are, for the most part, inaccurate (e.g., that parole boards possess expertise which enables them to "determine whether a particular prisoner is ready to return to society," *id.*, 454 F.2d at 897, or that present proceedings are "flexible," *id.* at 898), and/or (2) encourage courts to determine the basic issue by the use of labels and fictions (e.g., right/privilege, "vested rights," and so forth, *id.* at 897). Plaintiffs therefore believe that only by demonstrating, through an extensive evidentiary showing at trial, that the whole process is *in fact* infected throughout with unwarranted assumptions, unreliable documents, and illegal practices, will they be able to convince both the District Court and the appellate courts that their legal claims are valid and that the relief which they seek is justified.



plaintiffs' need for production of the particular documents here in question.

**A. Personnel Files of Adult Authority Members.**

The virtually unlimited discretion of the Adult Authority is often defended on the grounds that parole board members possess unusual "expertise" in making the type of parole decisions which plaintiffs challenge in the underlying case in the District Court.[29] In addition, courts may assume that, in accordance with California Penal Code §5075 (West 1970), "members shall be selected who have a varied and sympathetic interest in corrections work including persons widely experienced in the fields of corrections, sociology, law, law enforcement, and education." Therefore it is a manifestly crucial part of plaintiffs' case to show that *in fact* members and representatives have no such "expertise" or experience, but to the contrary are indeed—as the complaint alleges—extremely

[29]"[T]he whole concept for the indeterminate sentence rested on the assumption that persons sentenced to prison would be examined by a board of 'experts' who would have the skills as well as the total discretion to decide when, if ever, to release prisoners from one day to life sentences they were serving . . . today the completely indeterminate sentence idea is rarely in use and has few supporters among professionals in correctional administration. In part, I suppose, this is because there are in fact no 'experts' really skillful or confident enough to claim or exercise such limitless discretion." Johnson, "The Responsibility of a Parole Board to Change its Own Role", *Corrections in Context: The Criminal Justice System and the Corrective Function*, ed. Doris Grotewohl Baker, University of Wisconsin Extension Center for Continuing Education and Community Action for Social Service, 1972. In addition, in their answer to the complaint defendants "assert that Adult Authority members and representatives have expertise and a great deal of experience with respect to the tasks performed by them to which the complaint makes reference • • •." App. 360.

unsuited to their task. These allegations have been expressly denied by petitioners in their answer (App. 360), and are properly at issue in the District Court. In addition, plaintiffs intend to call most if not all members of the Adult Authority as adverse witnesses at trial. Therefore whatever else may be said about the personal files of the members and hearing representatives, it cannot be said that they are irrelevant to the subject matter of the litigation (Rule 26, F. R. Civ. P.); *or* that they are not reasonably calculated to lead to admissible evidence (*ibid.*); *or* that they would not be "particularly important to preparation for effective cross-examination of * * * [adverse] witnesses." *United States v. Meyer,* 398 F. 2d 66, 72 (9th Cir. 1968).

**B. Inmates' Central Files.**

The only documents which Adult Authority members consult in determining whether or not to fix an inmate's term are contained in the inmate's "central file". Specific documents typically relied upon include pre-Board reports prepared especially for the hearings; psychiatric evaluations; disciplinary reports; a "cumulative summary", containing information about the inmate's background and commitment offense; reports concerning previous board appearances, including reasons for denying parole; and CDC Form 128, upon which prison staff members can make notations about any aspect of the inmate's behavior. Plaintiffs have alleged in the complaint that this material, upon which Adult Authority members heavily depend, is unreliable



> "because it is composed of reports which (i) are often false, malicious, inaccurate, or misleading; (ii) are essentially one-sided, insofar as they contain almost exclusively adverse material, without a corresponding emphasis upon the positive aspects of an inmate's prison behavior; (iii) are placed in an inmate's file through a process which contains no substantial safeguards whatsoever to determine reliability; and (iv) may not be reviewed by the inmate, who is therefore unable to refute even the most demonstrably untrue information." App. 40-41.

In order to prove this allegation—which is plainly crucial to their case—plaintiffs need to inspect many such files, and then to introduce at trial documents which they can show to be false or misleading.[30] Similarly, plaintiffs need to show that many psychiatric reports which are contained in the central files, and often given conclusive weight in denying an inmate parole, are incorrect, misleading, ambiguous, or "questionable at best," *In re Rodriguez, supra,* 14 Cal. 3d at 651 n. 16. In addition, review of the entire central files of the named plaintiffs is essential in order to prove the allegations in the complaint concerning their treatment by the Adult Authority. App. 18-39. Such review is also necessary with respect to those inmates

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[30]For example, in *In re Rodriguez, supra,* the court commented upon an adverse document in petitioner's central file which was, at the hearing in that case, conceded to be false by the Adult Authority's attorney. See *In re Rodriguez, supra,* 14 Cal. 3d at 648 n. 14. The court also noted several other major inaccuracies and contradictions in the file, including a report that the petitioner's "family rejects him," when in fact "the family had available not only a home for petitioner but also employment in the family business." *Id.* at 651 n. 16.

whom plaintiffs intend to call as witnesses at trial, as well as those inmates, if any, whose testimony defendants plan to use.

Moreover, plaintiffs' otherwise compelling need to inspect these central files is made all the more urgent by the fact that defendants' attorneys have unlimited access to all of these files and will doubtless utilize whatever documents prove useful to impeach the plaintiffs and their witnesses, and to disprove the allegations contained in the complaint.[31] For this reason, every such file is a potential time bomb for plaintiffs at trial, since defendants' counsel can pick and choose from among all of the documents which it contains for purposes of impeachment. Thus the United States Magistrate who initially heard the discovery motions in this case was clearly correct when he concluded that these central files, together with the hearings themselves, are "the most relevant matters that might tend to support the plaintiffs' claims * * *." App. to Defendants' Petition for Writs of Certiorari, p. xl.

**C. Adult Authority Documents.**

Apart from the Adult Authority personnel files, discussed above, plaintiffs requested that defendants produce six other types of documents. App. 711-12 n. 5. Initially, we note that many of them almost surely consist of, or at least include, written material which

[31]See, e.g., *In re Hutchinson*, 23 Cal. App. 3d 337, 340, 100 Cal. Rptr. 124, 126 (1972), in which the respondent prison superintendent, represented by the Attorney General, filed a "plethora" of records from the prisoner-petitioners' central files in support of his return to the court's order to show cause, while at the same time refusing to make those files available to petitioners' counsel.



falls well outside the governmental privilege, insofar as they are memoranda which make suggestions subsequently adopted as the official policy of the Adult Authority (e.g., *id.*, items number 14, 18, 21, 22); which explain and elaborate upon official regulations (*id.*, items number 21 and 22); or which consist of the type of directive to members and hearing representagency (*id.*, item number 20).[31a] Moreover, it is quite likely that item number 15, calling for statements relating to pending legislation, also falls outside the ambit of the governmental privilege. And many documents described by the request doubtless contain the type of factual material (e.g., percentage of hearings in which paroles were granted, average length of

[31a]For a good example of how "secret law" is promulgated directly by the Chairman of the Adult Authority, see the memorandum issued by defendant Kerr which is Exhibit D to the deposition of Mr. Kerr dated January 22, 1973, and is reproduced as Appendix C hereto. That memorandum informs all Adult Authority members and hearing representatives that the staff of the Attorney General sees "no major problem" if a correctional counselor writes a psychiatric report for the Adult Authority, provided a qualified psychiatrist or psychologist reviews and approves it. Although Mr. Kerr somewhat curiously stated that neither he nor the board had ever "taken a position" on this matter (deposition of January 22, 1973, at 74-75), the import of the memorandum is obvious, especially since such reports are in fact written by counselors (*id.* at 75-77). Mr. Kerr said that he did not know whether or not this recommendation was secret or public (*id.* at 72).

Adult Authority hearings) or investigative reports which also are not covered by the privilege. All such material, of course, must be produced for plaintiffs without any consideration given to whether or not it is considered "confidential" by defendants or whether plaintiffs' need for it outweighs the harm which its disclosure might cause. See pages 27-31, *supra.*

We come, then, to a consideration of documents which, *arguendo,* fall within the ambit of the qualified privilege, i.e., intra-agency memoranda of an advisory or decision-making nature. Such memoranda are most likely to articulate, *inter alia,* defects in (i) the present system of adopting policies and regulations; (ii) the standards or procedures utilized in fixing terms and granting paroles; (iii) the materials relied upon in the term-fixing hearings; (iv) the conduct of the hearings themselves; or (v) results reached by the Authority which are perceived to be incorrect or inequitable. Certainly no elaboration is needed on the utility of such admissions from these defendants concerning the very defects alleged in the complaint. Thus, plaintiffs may be hard pressed to demonstrate to the District Court that the hearings are too short, or that the psychological evaluations are not understood by Adult Authority members, or that the Adult Authority members have difficulty in communicating with members of minority groups. But if official documents of the agency were to acknowledge that any or all of these statements are in fact true, the effect upon the outcome of the trial could be considerable. Doubtless it is this very concern which has prompted defendants to resist with such tenacity, at every stage



of the discovery process, the production of the documents which are at issue in this case.[32]

More could, of course, be said concerning the utility of these documents to the plaintiffs at the trial of this matter in the District Court. However, it is necessary to consider also the harm which would result from disclosure of these documents in accordance with the District Court's orders. As noted earlier, the court issued strong protective orders which cover most of the documents at issue, and in fact plaintiffs would not oppose extension of those orders to cover all documents produced during the course of this litigation. Under the terms of those orders, (1) most of the documents are to be viewed only by counsel for plaintiffs and their assistants (and this only to the

[32]Throughout their opening brief, defendants refer to the other discovery which plaintiffs "have demanded and have been furnished • • • in massive proportions" (Defendants' Brief at 21-24), and which in their view significantly reduces plaintiffs' need for the documents here at issue. However, the amount of discovery which plaintiffs have *demanded* has been relatively minimal when measured against the standards of major test case, class action litigation. The discovery which plaintiffs have been *furnished* is much less than that, due to defendants' refusal to answer or otherwise comply with much requested discovery. (For example, defendants have refused to supply answers to many interrogatories, including those which sought to determine which witnesses defendants may call and what documents they may introduce at trial, and this at a time when the trial date was but a few months away. See, e.g., answers of defendant Charles Brown to Plaintiffs' Interrogatories No. 60-78, filed March 13, 1975. But more importantly, there really is no satisfactory way to prove, for example, how the Adult Authority operates, in secret, to make policy or even to prove what that secret policy is; to prove that the inmate central files contain false and misleading material to a significant degree; or to show that the Adult Authority members in fact do not possess the supposed expertise, other than to make that proof from defendants' own files. Therefore even that discovery which defendants have reluctantly furnished cannot perform the crucial function of proving out the "secret law" of this agency which is, to a large extent, at the heart of this case.

extent necessary to the conduct of the litigation); (2) no inmate's central file may be inspected unless he has consented thereto; and (3) plaintiffs' counsel are charged with protecting the confidentiality of all central files inspected by them or by their assistants.[33]

Therefore the question is not the general one posed in FOIA cases—where official documents are simply turned over to members of the public, with no strings attached—as to whether *some* sort of harm *might* result from the uncontrolled availability of a confidential document. In such cases, where a document could be obtained by or turned over to political "enemies" or might even be published and thereby disseminated to the world at large, there may well be considerable wisdom in the rule protecting those intra-agency memoranda which comprise part of the consultative functions of government. But here the question of harm is a much narrower one, to wit: what harm is in fact likely if plaintiffs' attorneys, officers of the court, and a few assistants obtain these documents for use solely in this litigation, having been ordered by the District Court not to disclose their contents to any other person under pain of contempt? It is our sub-

[33]Defendants' analysis of the effect of the protective order in determining the validity *vel non* of the discovery orders, at page 45 of Defendants' Brief, is faulty. There they argue that "a protective order is no substitute for the privilege," since "if defendants' assertions of confidentiality are well taken, the documents are privileged from any disclosure." However, the determination which the court must reach is whether or not the harm from disclosure outweighs plaintiffs' need for the documents, and to the extent that a protective order diminishes or even eliminates any such harm, it must naturally be considered in determining whether the *qualified* governmental privilege applies to these documents. See pages 31-33, *supra*.



mission that, unless plaintiffs' counsel would disobey the protective order (which defendants have never suggested), virtually *no* harm will *in fact* be incurred by defendants. Certainly defendants have never once attempted to show or even to describe, in any court, the specific harm which they believe outweighs the need for plaintiffs to utilize this information at trial.[34]

In our view, plaintiffs' substantial need for these documents clearly outweighs the speculative and probably illusory harm which might occur if the discovery orders are obeyed especially where, as here, disclosure is severely limited in accordance with protective orders. This fact alone, under the cases, would have justified the District Court in ordering the documents disclosed in their entirety. Yet there are at least four other weighty reasons why, in the circumstances of this case, disclosure was fully justified.

*First,* there is the real and significant danger of excessive government secrecy, the main purpose of which is not to protect the public interest but rather the self-serving interests of the bureaucracy itself. See generally Berger & Krash, *Government Immunity from Discovery,* 59 Yale L. J. 1451 (1950); *Timken Roller Bearing Company v. United States, supra,* 38 F.R.D. at 68-69, and authorities cited. As a result of

[34]Generally, defendants are satisfied to summarize a "state's interest" in preserving the confidentiality of its documents. See, e.g., App. 173-74, 227 n. 2. Although certain of these interests (e.g., protecting informants and encouraging candor) are certainly worth preserving as a general proposition, defendants nowhere specify how they would *in fact* be jeopardized if the documents here at issue are viewed by plaintiffs' counsel in strict accordance with the restrictions imposed by the protective orders.

this concern, Congress reacted more strongly against proposed Rule 509 of the proposed Rules of Evidence —which would have contained a qualified privilege for official information—than against any other provision in the proposed rules. See generally 2 Weinstein's *Evidence* (1975) at 509-3; Berger, *How the Privilege for Government Information Met Its Watergate,* 25 Case Wes. Res. L. Rev. 747 (1975). "The outcry over this rule in Congress and the press, stimulated in large measure by the Watergate affair, may in itself have been sufficient to delay adoption of the rules and to cause deletion of Article V." 2 Weinstein's *Evidence, supra,* at 501-17. Therefore at a time when there is a broad movement toward more openness and less secrecy in governmental decision-making, restricted discovery orders such as those issued by the District Court serve a salutary purpose in countering "the potential for misuse of governmental privilege," *Carr v. Monroe Manufacturing Co., supra,* 431 F.2d at 388.

*Second,* it should be noted that a basis sometimes invoked for preserving the confidentiality of intra-office memoranda is the rule against "probing the mental processes" of an executive officer, a rule which is frequently said to foreclose investigation into the methods by which an administrative decision is reached. See generally *Carl Zeiss, supra,* 40 F.R.D. at 325 n. 24-30, and accompanying text. This rule is typically applied in cases where a litigant, in his effort to overturn a particular administrative decision, seeks to discredit the methods or mental processes of the decision-maker. See, e.g., *Machin v. Zuckert,* 316 F.2d



336 (D.C. Cir. 1963), *cert. denied* 375 U.S. 896 (1963); *Boeing Airplane Co. v. Coggeshell, supra.* Although these cases typically speak in terms of privilege, the Reporter to the Advisory Committee on Rules of Evidence, Professor Edward W. Cleary, has suggested that they

> "could be bottomed more solidly on considerations of relevance than on privilege. The situation resembles the doctrine of merger by verdict, in which the decisions, arguments, positions and statements of petit jurors simply become irrelevant." Hearings on Proposed Rules, *supra* at 577.

It sometimes happens, however, that what is at stake in litigation is not only the correctness of an agency's decisions, but also the validity of the decision-making process itself. Compare *Carl Zeiss, supra,* 40 F.R.D. at 329.

> "In these cases, usually involving claims of abuse of discretion, consultative memoranda may well acquire relevancy. Courts have recognized the distinction, although not always in the language of relevancy." Hearings on Proposed Rules, *supra* at 577.

Thus in cases in which there is reason to believe that the agency officials acted in a fraudulent or otherwise illegal manner in reaching decisions affecting one of the litigants, production of intra-agency memoranda of a consultative nature has been ordered over objections of privilege. *Ibid; Olson Rug Company v. NLRB,* 291 F.2d 655 (7th Cir. 1961); *Olsen v. Camp,* 328 F. Supp. 728 (E.D. Mich. 1970); *Bank of Dearborn v. Saxon,* 244 F. Supp. 394 (E.D. Mich. 1965),

*aff'd* 388 F.2d 496 (6th Cir. 1967). In the case at bar, of course, it is precisely defendants' decision-making procedures—and *only* those procedures—which are at stake; in fact, no administrative decision is challenged and sought to be overturned by this litigation.

*Third,* it is appropriate for this Court to consider "the seriousness of this litigation * * *." *Freeman v. Seligson,* 405 F.2d 1326, 1340 (D.C. Cir. 1968). For this case does not present, as do almost all of those in which the qualified privilege for official information has been upheld, the situation in which a private citizen seeks only to advance his own pecuniary interests through the litigation. Rather, this is a class action maintained by plaintiffs under the Civil Rights Act to determine the constitutionality of the procedures followed by the state's parole board. "It follows that only strong public policies should be permitted to prevent disclosure, particularly in suits under Section 1983 where enforcement of the statute is placed solely in the hands of individual citizens acting in the capacity of 'private attorneys general'." *Gaison v. Scott,* 59 F.R.D. 347, 352 (D. Ha. 1973); see also *Wood v. Brier, supra,* 54 F.R.D. at 10-11. "It would seem that the real public interest under such circumstances is not the agency's interest in its administration, but the citizen's interest in due process." *Bank of Dearborn v. Saxon, supra,* 244 F. Supp. at 402.

*Fourth,* it has been noted that in many cases in which the privilege was upheld the court was persuaded by the fact that "[s]ince the Government is not a party to the * * * action, no problem of unfair



litigating advantage is presented." *Carl Zeiss, supra,* 40 F.R.D. at 329, and cases cited. Thus the courts "have been more inclined to recognize executive privilege in litigation between private parties than in actions in which the Government is a party." 8 Wright & Miller, *supra,* §2019 at 173, and authorities cited at n. 30. Again, this case presents an excellent example of the principle, for here counsel for defendants have complete access to *all* of the documents at issue, as well as all other documents maintained by the Department of Corrections and the Adult Authority, and which they typically utilize in litigation which they are defending.[35] To deny that material to plaintiffs, while defendants make free use of it, is manifestly unfair.

In conclusion, we do not disagree with the general principle—as a general principle—that the decision-making processes of the various branches of government must be afforded a certain amount of confidentiality; and that routine disclosure of intra-agency memoranda of an advisory nature can prove harmful to the consultative functions of government. We do, however, point out that this is not an FOIA case, involving a plaintiff who may not even need the document but, once he has it, may use it in any way he wishes; or a defendant government agency whose refusal to disclose the documents requested could not be motivated by the desire to obtain (and does not in fact result in the government obtaining) an unfair litigating advantage. Rather, it is a case in

[35]See note 31, *supra*.

which (i) it is plaintiffs, as private attorneys general, who seek to vindicate the public interest by obtaining a fully informed decision concerning the constitutionality of the state's parole board; (ii) the documents at issue are extremely relevant to proving the allegations concerning the illegalities of defendants' procedures; (iii) the agency involved has entirely failed to demonstrate that it would in fact incur any harm if disclosure is ultimately required; and (iv) the documents are to be produced under protective orders which will, as a practical matter, all but eliminate any harm which might otherwise result from their production. Under these circumstances, it is our submission that the District Court was entirely justified in issuing the discovery orders which were at issue in the court below. At the very least, it cannot be said that the issuance of those orders was such an abuse of discretion or a "usurpation of power" that it ought to have been overturned by way of mandamus in the court below. See Section IV, *infra*. Consequently the decision of the court below could properly be affirmed on the ground that those orders were correct and should have been complied with by defendants.

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## III

### THE DECISION OF THE COURT BELOW, AND THE DISCOVERY ORDERS OF THE DISTRICT COURT, DO NOT VIOLATE ANY RIGHTS PROTECTED BY THE FOURTH AMENDMENT.

Defendants' Fourth Amendment argument is a novel one in at least two respects. First, it seeks to transform the Fourth Amendment—long considered



a fundamental protection of the people against the government—into a protection for the government itself. And secondly, it seeks to apply the Fourth Amendment to the discovery of documents under the Federal Rules of Civil Procedure. Significantly, defendants cite not a single case which supports either proposition, nor has our research uncovered one. But in addition to an absence of authority, defendants' argument simply will not bear the weight of analysis.

This Court has, of course, examined the history and purposes of the Fourth Amendment "on many occasions." *Warden v. Hayden,* 387 U.S. 294, 301 (1967), and cases cited. In doing so it has noted that the Fourth Amendment

> "was a reaction to the evils of the use of the general warrant in England and the writs of assistance in the Colonies, and was intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,' (Citation omitted), from searches under indiscriminate, general authority. Protection of these interests was assured by prohibiting all 'unreasonable' searches and seizures, and by requiring the use of warrants, which particularly describe 'the place to be searched, and the persons or things to be seized,' thereby interposing 'a magistrate between the citizen and the police' * * *." *Warden v. Hayden, supra,* 387 U.S. at 301.

Thus the amendment, which by its terms protects the "right of *the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (emphasis supplied), has long been applied by the courts to protect individuals and

their private papers from governmental intrusion. See, *e.g., Wilson v. U.S.,* 221 U.S. 361 (1911); *Hale v. Henkel,* 201 U.S. 43 (1906). Defendants fail entirely to show that the amendment was initially enacted, or has ever been construed, to afford similar protection to the government against individuals seeking official documents for use in litigation. Consequently, the short answer to defendants' argument is that the government simply has no standing to assert any rights afforded by the Fourth Amendment.

So far as defendants seek to invoke the Fourth Amendment rights of specific individuals, it is unlikely that they are legally able to do so, since the rights assured by the Fourth Amendment are personal to those who hold them. *Cf. Simmons v. United States,* 390 U.S. 377, 389 (1968). But even assuming *arguendo* that under some circumstances the government could assert the Fourth Amendment rights of its citizens, defendants have utterly failed to allege, in the courts below or in this Court, who those individuals are and what injury they are likely to incur as a result of the discovery which the District Court ordered. Such a failure to allege, in the District Court, concrete injury to specific individuals, makes defendants' assertion of Fourth Amendment rights at best premature. See *California Bankers Association v. Schultz,* 416 U.S. 21 (1974) where, in an analogous situation, this Court held that "[i]t will be time enough for us to determine what, if any, relief from the reporting requirement they may obtain in a judicial proceeding when they have properly and specifically raised a claim of privilege with respect to particular items of information required by the Secretary, and the Secretary has overruled their claim of privilege." *Id.* at 73. See also *United States v. Morton Salt Co.,* 338 U.S. 632, 653-54 (1950).



But in addition to making the requisite *allegations,* a person asserting a violation of his Fourth Amendment rights in civil litigation must also support that allegation with a proper *showing.* Thus in *United States v. Morton Salt Co., supra,* where a corporation was resisting, on Fourth Amendment grounds, an FTC subpoena requiring the production of certain corporate documents, this Court held that

> "[b]efore the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions. * * * If respondents had objected to the terms of the order, they would have presented or at least offered to present evidence concerning any records required and the cost of their books, *matters which now rest on mere assertions in their briefs.* The Commission would have had opportunity to disclaim any inadvertent excesses or to justify their demands in the record. We think these respondents could have obtained any reasonable modifications necessary, but, if not, *at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it."* *Id.* at 653-54 (emphasis supplied).

Here, of course, defendants' claim of privilege and their request for an *in camera* inspection were never supported by anything more substantial than "mere

assertions in their briefs", as we have shown at pages 33-60, *supra*.[36]

It is our further submission, however, that no such claim *could* be properly raised, at least in the circumstances of this case, because persons who voluntarily give information to the government do not have the type of interest protected by the Fourth Amendment. Such protection is generally reserved to one who has "been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or

[36]Defendants also attempt to liken a Rule 37 order compelling the production of documents in a civil case to a general search warrant, and the refusal of the District Court to conduct an *in camera* inspection to the failure of a magistrate to read an affidavit submitted in support of a search warrant. The basic flaw in this effort is that the purposes for, and consequences of, the issuance of a search warrant to the police are quite different than those which prevail in civil litigation where a court orders production of documents under Rules 34 and 37 of the Federal Rules of Civil Procedure. A search warrant is typically obtained through an *ex parte* proceeding, and permits police to unexpectedly enter a citizen's dwelling or office and there search for evidence which can be used in prosecuting its owner or possessor for the commission of a crime. In such a situation it is clearly reasonable to require a detailed description of the property sought, and to place the burden of showing the necessity of the search upon the government. By contrast, a Rule 34 request for production of documents (or a Rule 45 subpoena) gives an answering party ample time to review the documents sought and then, in his discretion, to invoke any applicable privilege or to seek a protective order under Rule 26. Moreover, the documents whose production is compelled under Rule 37 are not ordinarily used—as they will not be used in this case—for purposes of criminal prosecution; and where, as here, they are produced pursuant to protective orders, whatever harm might result from their production is even further diluted. Accordingly, to judge the legal validity of a Rule 37 proceeding by the standards typically employed in the issuance of search warrants is like trying to insert a round peg into a square hole. The two simply are not fungible, nor should they be, and for this reason also defendants' argument must fail.



seizure directed at someone else." *Jones v. United States,* 362 U.S. 257, 261 (1960); *cf. Couch v. United States,* 409 U.S. 322, 331 (1973). Here, however, there is no claim that the hypothetical individuals whose Fourth Amendment rights defendants seek to raise have such an interest in the admittedly public documents here at issue; rather, the vague and undefined harm to which disclosure allegedly subjects them would result solely from the use of information obtained from someone else.

Moreover, as defendants acknowledge, the Fourth Amendment applies only to the extent that a person has a reasonable expectation of privacy. See *Katz v. United States,* 389 U.S. 347 (1967). In a similar situation, this Court held that a person who voluntarily gave information to her accountant could not claim, for Fourth Amendment purposes, an expectation of potential privacy or confidentiality. *Couch v. United States, supra,* 409 U.S. at 335-36. There, as here, information was given to another in the knowledge that the recipient was likely to disclose much of it, and that "[w]hat information is not disclosed is largely in the accountant's discretion, not petitioner's." *Id.* at 335. Just that situation existed in this case, of course, since persons giving information to the government know, or should know, that the government will utilize it as it sees fit, and may disclose it to a number of individuals in a variety of situations, including court-ordered discovery. Therefore, as this Court has said in words wholly applicable to the case at bar, no Fourth Amendment claim can prevail when "there exists no legitimate expecta-

tion of privacy and no semblance of governmental compulsion against the person of the accused." *Id.* at 336.

Beyond that, it is well established that the Fourth Amendment was designed "for protection against *official* invasion of privacy and the security of property." *Jones v. United States, supra,* 362 U.S. at 261 (emphasis supplied).

> "Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen * * *." *Burdeau v. McDowell,* 256 U.S. 465, 475 (1921).

In this case the "seizure", although compelled by a Federal court, operates to place public documents in the hands of private citizens for use in suing the government, rather than placing them in the hands of the government for use against its citizens. For this reason also, the persons on whose behalf defendants seek to invoke the Fourth Amendment do not have the type of interest which the law requires. *Cf. Shapiro v. United States,* 335 U.S. 1 (1948).

But even if the government did have standing here to assert a Fourth Amendment right, either on its own behalf or on behalf of some unnamed third parties from whom it received confidential information, defendants' position is still untenable. For as they concede, no Fourth Amendment violation can be said



to have occurred if the District Court, in ordering disclosure of these documents, correctly concluded that the need for their disclosure in the litigation outweighed the harm that such disclosure might cause. *Cf. Branzburg v. Hayes,* 408 U.S. 665 (1972). "The gist of the protection is in the requirement, expressed in terms, that the disclosures sought shall not be unreasonable * * *." *Okla. Press Pub. Co. v. Walling,* 327 U.S. 186, 208 (1946). Therefore we fail to see how defendants' Fourth Amendment argument strengthens their position in this Court, since if the District Court did correctly order disclosure despite defendants' claim of governmental privilege, the order was necessarily "reasonable" within the meaning of the Fourth Amendment.

To summarize, then, it is our submission that neither the government nor the unnamed individuals who may have supplied information to the CDC or to the Adult Authority have standing, under the circumstances of this case, to invoke the protection of the Fourth Amendment. Even if they did, defendants' utter failure to specifically allege or thereafter demonstrate the harm which would in fact occur from disclosure disqualifies them from seeking the aid of the Fourth Amendment. And, since the discovery orders of the District Court were eminently reasonable, no Fourth Amendment violation could have occurred, even if the issues of standing and proof were to be resolved in defendants' favor. Hence defendants' Fourth Amendment argument is entirely without merit, and should be rejected by this Court.

## IV

**BECAUSE THE DISCOVERY ORDERS OF THE DISTRICT COURT DO NOT CONSTITUTE A USURPATION OF POWER OR A CLEAR ABUSE OF DISCRETION, THE COURT BELOW PROPERLY REFUSED TO ISSUE A WRIT OF MANDAMUS.**

Since discovery orders are not generally appealable (see 8 Wright & Miller, *supra,* §2066 at 29, and cases cited at n. 63), defendants petitioned the court below for a writ of mandamus. Yet the limitations placed upon the extraordinary writ of mandamus by this Court make it clear that issuance of the writ would not have been proper.

We begin with this Court's often expressed reluctance to "thwart the Congressional policy against piecemeal appeals." *Will v. United States,* 389 U.S. 90, 104 (1967). Since "it is established that the extraordinary writs cannot be used as substitutes for appeals," *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953), it is not enough for a party seeking mandamus to show that the trial court entered orders which were merely erroneous. *Will v. United States, supra; Bankers Life & Casualty Co. v. Holland, supra.*[37]

[37]The ruling on a question of law decisive of the issue presented by • • • [plaintiffs'] motion and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it. (Citations omitted.) Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power, (citation omitted), and is reviewable upon appeal after final judgment. If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the



Instead this Court has characterized mandamus as being "drastic and extraordinary" in nature, *id.* at 106, one which should be "reserved for really extraordinary causes." *Ex Parte Fahey,* 332 U.S. 258, 260 (1947).

Although the language employed to describe the proper limitations of mandamus is usually broad and often vague, it would appear that at least two essential elements must be present for the writ to issue. The first is that the trial court must have exceeded or refused to exercise its jurisdiction. *Roche v. Evaporated Milk Assn.,* 319 U.S. 21, 26 (1943). Thus mandamus is to be reserved for circumstances amounting to "judicial usurpation of power," *Will v. United States, supra,* 389 U.S. at 95, or a "clear abuse of discretion," *Bankers Life & Casualty Co. v. Holland, supra,* 346 U.S. at 383. Stated differently, the writ should issue only when the right to such relief is "clear and indisputable." *Will v. United States, supra,* 398 U.S. at 96.

The second element which an applicant for mandamus must demonstrate is the likelihood that he will suffer extraordinary injury if the writ does not issue. That burden is not met, however, by adverting to the

All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction. In strictly circumscribing piecemeal appeals, Congress must have realized that in the course of judicial decisions some interlocutory orders might be erroneous." *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 382-83 (1953).

"hardship [which] may result from delay and perhaps unnecessary trial." *Bankers Life & Casualty Co. v. Holland, supra,* 346 U.S. at 383. Nor is mandamus appropriate simply because, as here, a party will otherwise be forced to undergo "the full and vigorous discovery that a large, system-wide class action anticipates." *In re Estelle,* 516 F.2d 480, 484 (5th Cir. 1975).

Finally, we note that "the party seeking mandamus has the burden of *showing* that its right to issuance of the writ is 'clear and indisputable.'" *Will v. United States, supra,* 389 U.S. at 96 (emphasis supplied). Such a showing must, of course, be based upon the record in the District Court, not upon mere assertions of counsel. *Id.* at 102-104.

It is our submission that application of these principles to the situation at bar furnishes yet another ground upon which to affirm the decision of the court below. As we have argued in the preceding sections of this brief, defendants never did demonstrate to the court what documents were involved, or what harm would occur to what individuals, or to what governmental functions, if discovery proceeded as ordered, pursuant to the protective orders. And, in addition to defendants' failure to make the requisite showing of harm, we have also shown that the discovery orders of the District Court were quite reasonable and clearly correct. Such matters involving discovery are peculiarly within the discretion of the trial judge, and in exercising it the judge in this case was careful to condition disclosure upon adherence, by plaintiffs' counsel, to strict protective orders.



But even if, *arguendo,* these orders are erroneous, the limited discovery they order, subject to the restrictions of the protective orders, clearly does not rise to the level of a "usurpation of power," or a "clear abuse of discretion." Defendants plainly admit, as they must, that the privilege for official information is a qualified one, requiring the trial judge to strike a balance between disclosure and confidentiality. "Thus the most that can be claimed on this record is that * * * [the District Court] may have erred in ruling on matters within his jurisdiction," *Will v. United States, supra,* 389 U.S. at 103-04, and the "extraordinary writs do not reach to such cases * * *." *Ibid.* On this ground alone, then, it would be proper to affirm the decision of the court below.

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## CONCLUSION

For all of the foregoing reasons, respondents respectfully request this Court to affirm the decision of the court below, either for the reasons set forth in that court's opinion or on the ground that the orders issued by the District Court, dated June 20, 1974, and December 3, 1974, are correct and should be complied with by petitioners. Should this Court reverse the decision below on the ground that the District Court ought to have conducted an *in camera* inspection of the documents in question, we urge this Court to set forth detailed guidelines, such as those discussed at pages 56-60, *supra,* to govern such inspections. Those guidelines should require the party resisting production to make a detailed showing in support of the

claimed privilege and should permit counsel for the discovering party to have meaningful *in camera* access to the documents for purposes of making an informed, adversary presentation on the issues of relevancy and privilege.

Dated: September 15, 1975.

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**(Appendices Follow)**

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# APPENDIX

## Appendix A

State of California
Memorandum

Health and Welfare Agency
Date: May 11, 1973
File No.:

Subject: Adult Authority Hearing
During April, 1973

To: Mr. R. K. Procunier
Director of Corrections

Mr. Henry W. Kerr
Chairman, Adult Authority

From: Department of Corrections,
Sacramento 95814
Marie Vida Ryan, Senior Statistician
Administrative Information
& Statistics Section

For the first time in over five years, fewer than 20 percent of the male felons heard by the Adult Authority received release dates. Only 265 of the 1,493 men heard in April were granted release dates.

Almost 60 percent of the 265 men with dates set during April were to be released within six months following the date of hearing. Over one-third (34.4 percent) received release dates effective during the 7-12 month period after hearing while the remaining 6.4 percent received dates 13 months or more away from hearing date.

While the number of men with release dates continued to drop, the male felon institution population

continued to rise, causing the percentage of male felons with release dates as of April 30 to fall to a low of 16.5 percent. Of the 17,465 men in the institutions at the end of April, only 2,873 had dates.

Marie Vida Ryan
/s/ Marie Vida Ryan
Senior Statistician

MVR:mg
Attachments

cc: A. A. Members and Reps.
Executive Staff
Research Division

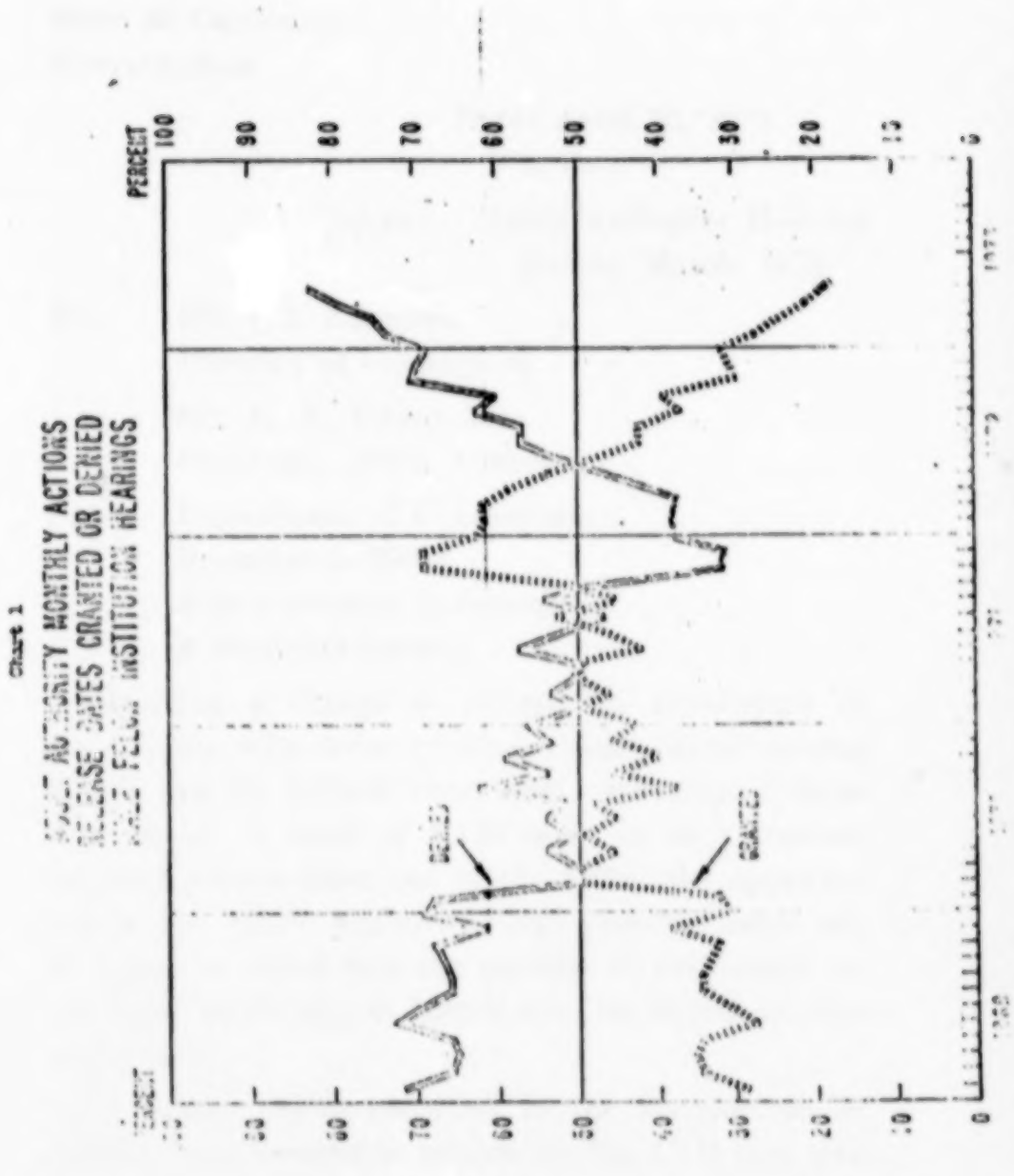



Chart 1

## Appendix B

State of California
Memorandum

Date: April 25, 1973
File No.:

Subject: Adult Authority Hearing
During March, 1973

To: Mr. J. J. Enomoto
Director of Corrections

Mr. R. K. Procunier
Chairman, Adult Authority

From: Department of Corrections,
Sacramento 95814
Administrative Information
& Statistics Section

Reflecting a change in policy, the percentage of male felons who were granted release dates during March was the highest ever, since reporting of these data began. A total of 1,732 men, or 88.5 percent, received release dates out of the 1,958 who appeared before the Adult Authority with possible dates set. It should be noted that the number of men heard by the Adult Authority in March was the largest in over four years.

Significant shifts occurred in the distribution of months from hearing to release for the 1,732 men who were granted dates in March compared to prior months. Increases may be observed in the percentage of male felons receiving dates effective 13-18 months

and 19 months or more following their hearings. The off-setting decreases are within these groups scheduled for release 4-6 months and 7-9 months following date of hearing.

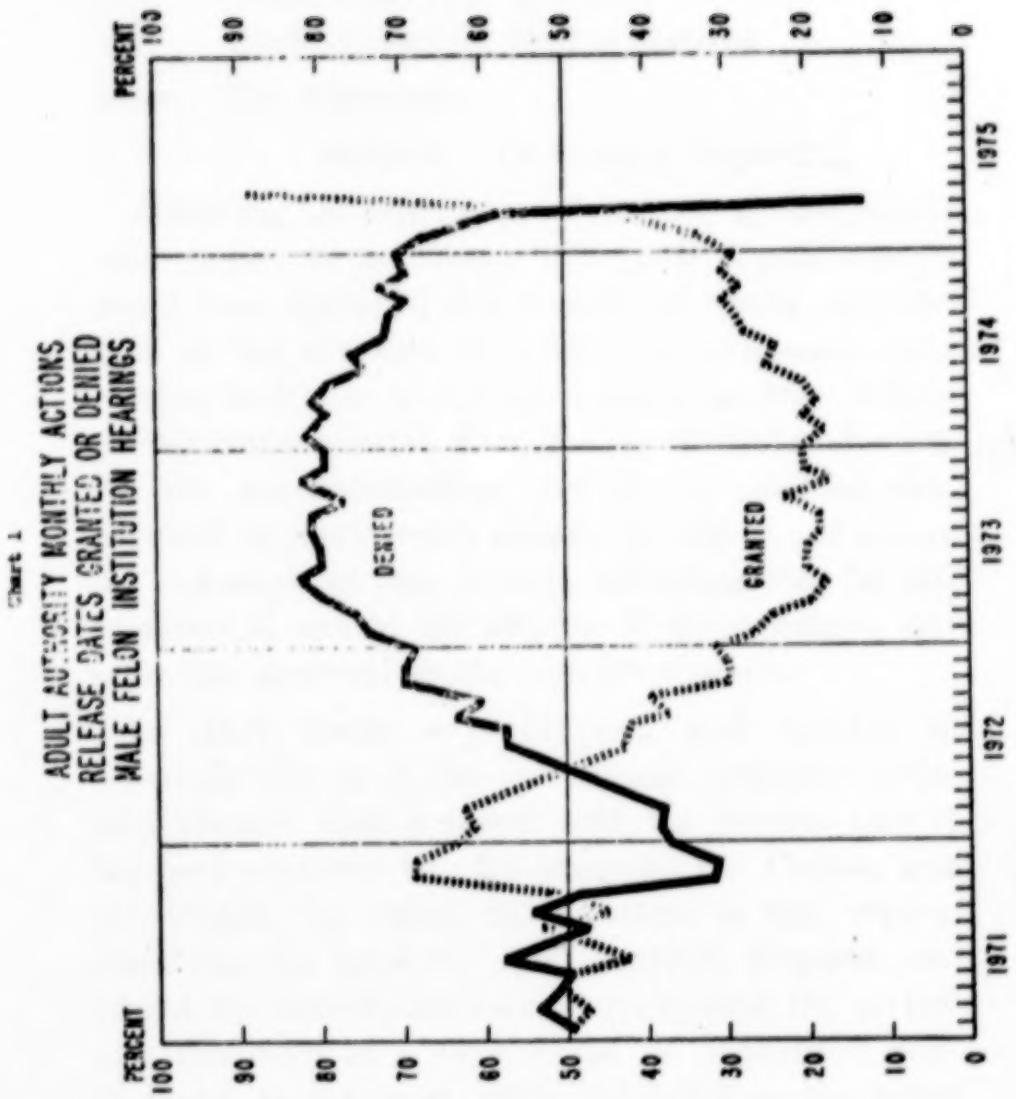
The male felon institution population numbered 21,548 on March 31, 1975, of which 3,722 men (17.3 percent) had release dates. Within six months, 56.9 percent of those with date as of the end of March should be released, compared to 71.2 percent as of the end of February. The percentages for those men holding dates more than 12 months away, as of the end of February and of March, are 4.6 percent and 19.8 percent, respectively.

Despite all of these changes, the median time from hearing to release for the 1,187 male felons set for first parole during the March calendar hearings remained at 42 months, the same as in February, 1975 and November, 1974. This median of 42 months was one month less than the 43 months set during the January 1974 calendar hearings for felons first paroled.

Marie Vida Ryan
/s/ Marie Vida Ryan
Senior Statistician

MVR:mg
Attachments

cc: A. A. Members and Reps.
Executive Staff
Research Division

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## Appendix C

State of California
Memorandum

Date: February 5, 1971

To: Adult Authority Members
Adult Authority Representatives

From: The Chairman

Subject: Psychiatric Reporting

Following an expression of concern by the Board with respect to psychiatric and psychological reporting. I have discussed this matter informally with the staff of the Attorney General. They expressed their opinion that they do not see a major problem with a correctional counselor writing a psychiatric evaluation for the Adult Authority, provided a qualified psychiatrist or psychologist reviews the report and affixes his signature to that report, indicating that he has reviewed it, and by the affixing of the signature, signifies his approval to the report's contents.

In other words, a professional staff member at Vacaville who is in the correctional counselor series may prepare such a report with the proviso that it has been reviewed by (for example) Dr. Clanon, and Dr. Clanon has affixed his signature to that report, signifying his approval of its contents. Reports presented by correctional counselors without the review and signature of a psychiatrist or a qualified psychologist do not meet either the letter or the spirit of existing statutes.

/s/ Henry W. Kerr
Henry W. Kerr
Chairman, Adult Authority

HWK:kf
cc: Mr. R. K. Procunier

Supreme Court, U. S.
FILED
NOV 7 1975
MICHAEL RODAK, JR., CLERK

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1974

## No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*
JOHN VAN GELDERN, et al., *Real Parties in Interest.*

## REPLY BRIEF OF PETITIONERS

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# In the Supreme Court
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OCTOBER TERM, 1974

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*
JOHN VAN GELDERN, et al., *Real Parties in Interest.*

## REPLY BRIEF OF PETITIONERS

## I.

### THE FACTS IN PERSPECTIVE

Plaintiffs do not confront the question before the Court, but discuss strawmen and extraneous matter. Allegations concerning the functioning of the Adult Authority are yet to be litigated in the district court, but plaintiffs present them here as facts necessary to a proper resolution of pre-trial discovery questions (Respondents' Brief pages 4-11).[1] Plaintiffs discuss a line of case under *United States v. Reynolds,* 345

[1]These statements in Respondents' Brief belie plaintiffs' position that without the disputed documents they are required to litigate in the dark.

U.S. 1 (1953), without mentioning that the district court order (A. 648) precludes compliance with *Reynolds*.

Plaintiffs insist that defendants did not meet a burden of describing the documents and of making an evidentiary showing that privilege applies. Yet, defendants offered the *best evidence*—the documents themselves. This single circumstance obviates much of plaintiffs' brief which relies on cases, e.g., *Reynolds,* and *Black,*[2] whose stringent requirements assume the court will determine privilege only on the basis of the text of its assertion without an opportunity to actually examine the documents.

Plaintiffs urge at length that factual material, and something called "secret law," are not even confidential, let alone privileged (Respondents' Brief, pages 27-31). Putting aside for the moment the obvious point that any such material would be apparent to the court on an *in camera* inspection, the so-called factual material has been furnished (and described in Respondents' Brief, Statement of the Case, pages 9-10) in response to document demands not here at issue (e.g., A.51-56, Demands Nos. 12, 13). Plaintiffs also call the Court's attention to documents which form the basis for, or explain, agency decisions (Respondents' Brief, pages 28-29). But this information has been furnished in response to document demands not here at issue (e.g., A.51-56, Demands Nos. 2, 3, 4, 12, 13, 17). Plaintiffs' reference to "secret law" is equally perplexing as their argument cites as examples specific

[2]*Black v. Sheraton Corporation of America*, 371 F.Supp. 96 (D.C. 1974).



documents which have in fact been furnished (Respondents' Brief, page 30, footnote 14). See, A.51-56, Demands Nos. 2, 3, 4).

Plaintiffs appear most fascinated by a statement in *Black v. Sheraton Corporation of America, supra* which is quoted three times early in Respondents' Brief, and then, lest it might be overlooked, is repeated much later:

> "The question at the core of any claim of executive privilege is whether the damage resulting from disclosure outweighs the need for just resolution of a legal dispute." *Black, supra,* 371 F.Supp. at 100 (Respondents' Brief, pages 22, 32, 33, 61).

This statement assumes that every document demanded is necessary to a just resolution of a legal dispute. The thought in the statement could be applicable *only* where privilege is asserted for a document without which the proponent of its discovery could not proceed with its case.[3] The statement does not apply to *any* claim of executive privilege, and plaintiffs' willingness to proceed with trial without any of the documents here at issue concedes the documents are not needed for just resolution of this legal dispute in the district court.[4]

[3]Plaintiffs have asserted in this Court their willingness and ability to proceed to trial without any of the documents at issue (Plaintiffs' Memorandum Regarding Suggestion of Mootness).

[4]In any event, plaintiffs' position is more closely analogous to the earlier opinion in *Black* where the district court denied demands for the information because its confidentiality outweighed plaintiffs' need for it in light of available alternate sources of information—depositions of FBI agents. *Black v. Sheraton Corp. of America*, 50 F.R.D. 130 (DDC 1970) (Sirica, J.) [See, 371 F. Supp. at 99].

Plaintiffs attack the *in camera* proceeding as subversive of the adversary system, as beyond the competence of district judges to reach an informed determination, and as a burden on the courts.[5] (Respondents' Brief, pages 45-60). This Court has recognized the capacity of district judges to evaluate exceptionally complex and subtle considerations at ex parte non-adversary proceedings. *United States v. United States District Court, Northern District, Mich. et al.*, 407 U.S. 297, 320-321 (1972).

Plaintiffs suggest the government could frustrate discovery altogether by asserting confidentiality, and necessity for an *in camera* inspection, for masses of documents too great for the court to handle. (Respondents' Brief, pages 54-55). But the other side of this coin is the plaintiffs' tactic of indiscriminately demanding a mass of documents too great for a department head to handle for purposes of asserting particularized privilege under *Reynolds* procedures. Indeed, were the department head to comply with *Reynolds*, and demand an *in camera* inspection, the problem suggested by plaintiffs would be unavoidable.

Plaintiffs would enforce their dislike of *in camera* inspections by imposing five prerequisites (Respondents' Brief, pages 56-57), but fail to explain how these could be met under a Court order which states:

[5]Defendants do not dispute that in camera inspections "burden" the courts. Such matters, however, may be referred to magistrates (as have all discovery questions in this case). Also, the burden is necessary, and is cast as much by the indiscriminate scope of plaintiffs' demands as by defendants' interest against an unnecessary disclosure of concededly confidential documents.



> "All such central files made available upon request by plaintiff[s] shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (A.648).

Respondents' Brief also refers repeatedly to the opinion in *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), cert. denied 415 U.S. 977 (1974), [Respondents' Brief, pages 29, 31, 47, 57], a case where (1) the government agreed that disclosure of the material in question was warranted; (2) the documents in question referred to matters *adopted* by the agency [compare, A.51-56, Demands Nos. 2 and 3]; (3) there was an *in camera* inspection in the district court; and (4) the Court of Appeals did not totally brush aside the interest of the government but remanded for further proceedings designed expressly to protect that interest. *Id.*, 484 F.2d at 1090. In this case, the State disputes that disclosure of the documents is warranted; matters adopted by the government as basis for decision have been discovered in response to other document demands; there was no *in camera* inspection whatsoever in the district court; and the district court order irretrievably brushes aside any opportunity to further raise, let alone actually protect, the legitimate interest of the government.

As matters now stand, plaintiffs are authorized to designate any two hundred central files maintained on prison inmates, whereupon "all such central files made

available upon request by plaintiff[s] shall be produced without any material, memos, documents, summaries, reports, letters or other papers of any kind, shape or form, having been removed, altered, deleted or transferred in any way by defendants prior to plaintiffs' inspection." (A.648).

Contrast this inflexible directive with defendants' suggested procedure whereby plaintiffs would identify the inmate by name; the defendant having custody of the government's file on that inmate would examine it and remove confidential material, if any; the removal of such material would preliminarily be subject to negotiation with counsel upon further specificity by plaintiffs of their need for the document; and failing such negotiation the document would be submitted to the district court together with reasons for separating it from the otherwise discoverable contents of the file. (A.476, 525-528, 539-540, 586-587, 599-600). Notwithstanding this proposal, in September 1974, when plaintiffs asked for the files of 22 inmates by name, and when defendants informed the plaintiffs that they were retaining only certain specified and identifiable items for *in camera* inspection by the court, plaintiffs responded by filing a motion to compel full, unrestricted disclosure (A.446-456). Upon hearing this motion, the district court found that the preliminary withholding of any document was unauthorized by court order and threatened defendants and their counsel with contempt in the event of any reoccurrence. The order of December 3, 1974, under review here,



makes the right to claim confidentiality and privilege, asserted on behalf of independent State interests, null and void.

The central files are government files maintained by defendants on individual prison inmates. Defendants sought only to limit immediate access to those documents in the files which are in fact confidential and believed to be privileged under the circumstances of this case, and the opportunity, through their state Attorney General, to assert their claims of qualified privilege to the district court for resolution by an informed balancing of interests. Both the authority to preliminarily withhold and the opportunity to be heard have been denied.

No more was asked by defendants when also confronted with the demand for the personnel files maintained on themselves and on each hearing officer of the Adult Authority. It is difficult to perceive a discovery request more invasive of personal privacy or more likely to abuse or harass an individual, both litigant and nonlitigant. The problem is especially severe in this action initiated by state prisoners against their custodians. Accordingly, defendants asked for an *in camera* inspection of the personnel files. This was rejected outright:

> "[T]hat defendants' request for an *in camera* inspection of the personnel files for a determination of the relevance and a balancing of the materiality of their contents prior to release of the files to plaintiffs is denied." (Petition for Certiorari, Appendix, pp. xvi-xvii).

Since the grant of certiorari, plaintiffs have been permitted to select and inspect numerous central files subject to defendants' removing confidential matter. (See, Petitioners' Brief, pp. 23-24, and appendix thereto, pp. i-v). Plaintiffs have not been permitted to examine the contents of personnel files. This procedure has not affected plaintiffs' desire for immediate trial.

---

## II.

### UNDISPUTED FACTS AND CIRCUMSTANCES

Many facts and circumstances important to the Court's consideration of this matter are not disputed:

(1) The district court's discovery orders compel the defendants to produce confidential state government documents for adversary inspection. The confidential nature of *all* contents of inmate files was acknowledged by plaintiffs in their request to inspect them. A.234-235).[6] The recognition by the magistrate and by the district judge of the confidential nature of the contents of inmate files, and the personnel files is reflected in their protective orders [Personnel files: Petition for Certiorari, appendix pages xix-xx (magi-

[6]Plaintiffs' letter requesting access to inmate files states:

> "Naturally we would expect to treat this information in the strictest confidence, respecting its confidentiality in all respects, and we would be prepared to stipulate to a protective order indicating that we would not share this information with our clients or with anyone else, but would collect, collate and organize it for presentation to the court in this case. I do not think that this stipulation would be a problem since we are prepared to respect the confidential nature of the material. The names of these prisoners in every 20th file need not appear, or can be submitted *in camera*." (A.235).



strate); Petition for Certiorari, appendix page xvi (district judge). Inmate files: Petition for Certiorari, appendix pages xix-xx, xl (magistrate); Petition for Certiorari appendix pages xvi, xxxi-xxxii; (district judge). A.647, 649-650 (district judge)]. That the documents in question, other than inmate files and personnel files, are also of a confidential nature is recognized by plaintiffs where they state in their Respondent's Brief:

> "Although this protective provision, subsequently adopted as the order of the court, covers only the personnel files, plaintiffs would not object to an order extending it to the other documents here at issue." (Respondent's Brief, page 15, footnote 10).

(2) Confidentiality, and privilege, may be *asserted* not only as to particular documents, but also as to a class of documents (A.719, opinion of Court of Appeals; Respondent's Brief, pages 16, 19, 42). The "personnel files" comprise such a class of documents, as do the confidential portions of inmate files. The numerous categories of governmental memoranda demanded by plaintiffs comprise classes of documents the precise specification of which appears in the text of plaintiffs' demands for them.[7] The *determination* of privilege may, under defendants' offer, be made upon actual examination of any or all of the documents.

---

[7]The text of plaintiffs' demands for documents at issue in this action (other than the contents of inmate files and personnel files) appears at A.54-56, Items No. 14, 15, 18, 20, 21, 22.

(3) The district court examined none of the confidential documents ordered to be produced directly to plaintiffs' counsel, and expressly denied defendants' request for such an examination.

(4) The withholding of *any* documents from inmate files to be produced directly to counsel is viewed by the district court as a violation of its orders and punishable by contempt.[8]

(5) The documents in fact are not necessary to plaintiffs' case, and plaintiffs are willing, if not also anxious, to proceed to trial without the documents. This circumstance is amply demonstrated by plaintiffs' assertions of mootness heretofore filed in this Court. Plaintiffs' statements of their need for the documents (Respondent's Brief, Argument II, pages 60-80) should be presented to the district court for an informed *in camera* determination rather than to this

[8]The opinion of the Court of Appeals states that defendants may seek an *in camera* inspection at the time the documents are discovered in the district court (A.719). But this dicta would apply only to the personnel files and memoranda, and not to the inmate's files. The same Court of Appeals judges had one month earlier summarily rejected mandamus (A.199) to review the order compelling production of inmate files even though that order (A.647-650) by its terms required production directly to counsel of the entire contents of any 200 such files to be designated in the future —thus precluding any opportunity for such an *in camera* inspection as well as any opportunity to defendants to assert privilege upon actual examination of the documents before releasing them to the adversary. Finally, had particular documents been sealed and presented for *in camera* inspection "at the time of discovery in the district court," the district judge would certainly have rejected the tender (compare, *Enomoto v. United States District Court, Northern District of California*, No. 74-1499 (Petition for Writ of Certiorari, pages 8-11, filed May 29, 1975), and considered the matter a violation of its order.



Court as a basis for denying any *in camera* proceeding below.[9]

(6) The merits of the action in the district court, the discovery sought by plaintiffs, and the discovery orders are all intended to run against, and all in fact run against, the State government.

(7) In the action in the district court plaintiffs do not challenge or seek to overturn any agency or administrative decision. (Respondent's Brief, pages 22-23, 78).

(8) Plaintiffs have abandoned their claims for relief at parole rescission, parole revocation, and prison disciplinary proceedings and have limited the action in the district court to parole consideration—term fixing proceedings. (Respondent's Brief, page 6, footnote 3).

[9]Plaintiffs' assertions nevertheless fail to inform this Court that the information they now claim they seek in these documents has been provided. Extensive biographical backgrounds of Adult Authority members and hearing representatives were furnished in response to interrogatories (A.323-325, Interrogatories No. 1 through 5) and depositions (see A.309-311). Rules, regulations, policies, procedures, statistics, reports, speeches, etc. were furnished in response to plaintiffs' demands for documents (A.51-56, Demands Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 16, 17, 19). Dozens of inmate files have been inspected by plaintiffs for mistakes, etc. (e.g. A.497-524; Brief of Petitioners, appendix pages i-v).

## III.

**AS THE ELEVENTH AMENDMENT BARS JURISDICTION OF THE DISTRICT COURT IN THE UNDERLYING ACTION, THE DISCOVERY ORDERS ARE VOID.**

The Eleventh Amendment to the Constitution of the United States provides as follows:

> "The judicial power of the United States shall not be construed to extend to *any suit in law or equity,* commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign state." (emphasis added).

This amendment applies to a suit brought against a State by one of its own citizens as well as to a suit brought by a citizen of another State. *Ex parte Young,* 209 U.S. 123, 150 (1908); *Ex parte New York,* 256 U.S. 490, 497-498 (1921).

The Eleventh Amendment bars suits not only against the State when it is named as a party, but also when it is the party in fact. *Scheuer v. Rhodes,* 416 U.S. 232, 237, 238 (1974) (and cases there cited). Whether the Eleventh Amendment applies "is to be determined not by the mere names of the titular parties but by the essential nature and effect of the proceedings as it appears from the entire record." *Scheuer v. Rhodes, supra,* 416 U.S. at 237.

*Ex parte Young, supra,* 209 U.S. at 150-51, states (1) that where the demand is against an officer of the State not personally, but officially, the State is a party and the suit is barred (citing *Governor of Georgia v. Madrazo,* 1 Pet. [26 U.S.] 110, 122, 123 (1826)); (2) that the same is true of demands against



officers of the State who, as individuals, have no personal interest in the subject matter of the suit, and defend only as representing the State [citing *In re Ayeres,* 123 U.S. 443 (1887)]; (3) that a suit cannot be maintained to compel the performance of an obligation which could only be performed by the State as where the things to be done by the actual defendants are the very thing which when done would constitute performance of an obligation of the State [citing *Hagood v. Southern,* 117 U.S. 52, 67 (1886)].

Such actions simply attempt to make the State itself, through its officers, perform an alleged obligation by directing State officers to do acts which constitute such performance. Under these circumstances the State alone has an interest in the question, and a decree in favor of plaintiffs would affect the treasury of the State. *Ex parte Young, supra,* 209 U.S. at 151. Respondents' Brief not only concedes, it asserts that the underlying action in the district court, as well as the discovery orders themselves, are intended to be, and in fact are directed against the State. (e.g., Respondents' Brief, pages 23, 86).

Plaintiffs seek no negative injunctive relief, but do seek a declaratory judgment and mandatory injunctive relief requiring substantial affirmative action by the State government (A.45-47).[10] The negative injunctive relief ruled proper in *Ex parte Young, supra,* was viewed an exception to the Eleventh Amendment

[10]The scope of the mandatory injunctive relief has been narrowed substantially by plaintiffs through successive amendments to their complaint. (See Respondents' Brief, page 6, footnote 3). Nevertheless, plaintiffs have never suggested an interest in negative injunctive relief.

bar because the injunction prohibited the enforcement of an unconstitutional statute, an illegal act, done not by the State, but by an individual who could be enjoined. Similarly, in *Scheuer v. Rhodes, supra,* it was necessary for this Court to conclude that "petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the *named defendants* for what they claim—but have not yet established by proof—was a deprivation of federal rights by these defendants under the state law." [emphasis by the Court]. 416 U.S. at 238. This determination was necessary to save from the Eleventh Amendment bar the claims of plaintiffs for monetary damages.

The district court's jurisdiction to adjudicate claims of deprivations of federal rights under color of State law exists only because of a statute—Title 42 United States Code, section 1981, et seq. These sections cannot be used to pursue relief in a manner which is barred by the Eleventh Amendment, as the statute, and practice under it, must yield to the Constitution. This does not leave plaintiffs without means to vindicate their asserted interests as proceedings under Title 28 United States Code, section 2254 are available, under appropriate circumstances, in a separate action (see footnote 12, infra, page 16).

As the district court's jurisdiction in the underlying action is thus barred, the discovery orders, which are a part of that action, must be void. Accordingly, even under the most stringent standard for mandamus these orders of a Court without jurisdiction should be vacated.



## IV.

### AS THE ACTION AS LIMITED BY PLAINTIFFS BARS THE COURT'S JURISDICTION UNDER 42 U.S.C. SECTION 1983, THE DISCOVERY ORDERS ARE VOID.

Plaintiffs, through successive amendments to the complaint, have narrowed the action in the district court so that it is "concerned solely with the term-fixing, parole granting hearings . . ." conducted by the Adult Authority. (Respondents' Brief, page 6, footnote 3). Whether and, if so, what process is due at a particular parole or term fixing proceeding depends on the prisoner's interests which are at stake at that proceeding. E.g., *Morrissey v. Brewer,* 408 U.S. 471, 481-482 (1972). Proceedings on parole granting and fixing of terms concern directly the fact or duration of a prisoner's custody. It is only these interests which could afford a basis for determining what process, if any, is due at such proceedings. A claim that due process is denied at parole grant or term fixing procedures which does not also carry with it a further claim that the result of such procedures is invalid under the Constitution, fails to present the only interest, liberty, which would constitute a basis for a claim to which due process might attach.[11]

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[11]Plaintiffs nevertheless insist they do not attack the correctness of any agency decision and do not seek to challenge or overturn any administrative decision by the underlying litigation in the district court (Respondents' Brief pages 22-23, 78). If this assertion is accepted, plaintiffs not only abandon their claim for liberty to which due process might attach but they also withdraw from the district court their case or controversy, render the litigation in the district court academic, and withdraw a basis for the district court's jurisdiction.

In *Preiser v. Rodriguez,* 411 U.S. 475 (1973), this Court held that where state prisoners challenge state administrative action directly affecting the fact or duration of their confinement, the sole federal remedy is appropriate proceedings in habeas corpus under Title 28 U.S.C. section 2254, and that relief under Title 42 U.S.C. section 1983 is unavailable because it would frustrate explicit congressional intent. *Id.* 411 U.S. at 489-490, 500.

A challenge to confinement is a habeas corpus matter. The appropriate relief is an alternative writ requiring either correction of the illegality affecting the length or duration of confinement or outright release from custody. See *Whiteley v. Warden,* 401 U.S. 560, 569 (1971); *Reck v. Pate,* 367 U.S. 433, 444 (1961). The nature of the requested relief and of the prisoner's interest cannot be changed simply by an assertion that only the procedures are being challenged and not the confinement itself. "It would only frustrate explicit congressional intent to hold that the [state prisoners] could evade this requirement [of exhaustion of state remedies] by the simple expedient of putting a different label on their [requested relief]." *Preiser v. Rodriguez, supra,* 411 U.S. 475, 498-590.[12]

For the above reasons the district court's jurisdiction over the action as limited by plaintiffs is barred

[12]Plaintiffs' failure to have exhausted available state remedies, and their refusal to challenge the validity of any particular administrative decision or to request relief from custody all preclude an opportunity to convert the underlying action, or to add to the underlying action, habeas corpus proceedings under Title 28 U.S.C. section 2254.



under 42 U.S.C. section 1983 and the discovery orders issued in the action must be void.

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## V.

### AS THE ORDERS COMPELLING PRODUCTION OF CONFIDENTIAL STATE DOCUMENTS ISSUED IN DEROGATION OF THE LIMITATIONS IMPOSED BY THE FOURTH AMENDMENT, THEY ARE INVALID.

Defendants' reliance upon the Fourth Amendment is not novel; rather, it is plaintiffs' reliance upon federal civil discovery procedures to indiscriminately obtain confidential State documents which is unique. Compulsory process is not exempt from the Fourth Amendment, and custodians of documents sought are not without authority to invoke the protection of the Fourth Amendment. The limitations inherent in the guarantee of the Fourth Amendment have been explicitly delineated, and the duty of determining that the limitations have not been breached devolves upon the judiciary. The district court abdicated its responsibility to arrive at an informed determination that the disclosure sought was justifiable, and the resulting orders are thus void under the Fourth Amendment.

#### A. An Order Pursuant to Rule 37(a)(2) of the Federal Rules of Civil Procedure Compelling Production of Documents is Subject to the Fourth Amendment.

Plaintiffs err in assuming that a mere assertion that documents are sought for use in litigation serves to abrogate Fourth Amendment rights. The applicability of the Fourth Amendment to the compulsory

production of documents is sustained by history, is enunciated in explicit language by this Court, and is exemplified by a variety of decisions.

In 1886, this Court recognized that the essence of a search and seizure is not the physical intrusion and taking of property, but rather is the element of compulsion to produce that which is otherwise protected. *Boyd v. United States,* 116 U.S. 616, 621-622 (1886). This Court has observed that "the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men,' (citation omitted), is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process (citations omitted) . . ." *United States v. Morton Salt Co.,* 338 U.S. 632, 651-652 (1950). This Court has considered the applicability of the Fourth Amendment to various forms of compulsory process. *See Okla. Press Pub. Co. v. Walling,* 327 U.S. 186, 208-214 (1946) [administrative subpoena duces tecum]; *McPhaul v. United States,* 364 U.S. 372, 382-383 (1960) [congressional subpoena dues tecum]; *Hale v. Henkel,* 201 U.S. 43, 71-77 (1906) [grand jury subpoena dues tecum].

History and precedent mandate the conclusion that an order pursuant to Rule 37(a)(2) compelling the production of documents is subject to the limitations inherent in the Fourth Amendment. As succinctly stated by this Court: "[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment." *Hale v. Henkel, supra,* 201 U.S. 43, 76 (1906); *see*



*also See v. City of Seattle,* 387 U.S. 541, 544-545 (1967). Accordingly, plaintiffs' assertion that the documents are sought for use in litigation merely prefaces the issue of whether production can be compelled consistently with the Fourth Amendment.

### B. Reasonable Expectations of Privacy With Respect to Confidential State Documents are Protected by the Fourth Amendment.

Plaintiffs' inability or refusal to perceive the Fourth Amendment interests which are at stake results from plaintiffs' misconception of the nature of the documents ordered to be produced and of the expectation entitled to be protected.

Plaintiffs first err in founding their observations on the assertion that the orders are directed to "admittedly public documents." (Brief of Respondents at p. 85). As a matter of State law, the documents sought are not available to the public (Cal.Gov. Code §§ 6254(a),(c),(f),(k), and 6255; Cal.Pen.Code § 11105),[13] and are subject to a claim of privilege in judicial proceedings (Cal.Evid.Code § 1040(a), (b)).[14] Insofar as the documents may contain certain criminal record information, unauthorized disclosure or receipt is a criminal offense (Cal.Pen.Code §§ 11140-11144).

Plaintiffs next err in assuming that it must be expected "that the government will utilize [informa-

[13] These code sections are set forth at pp. v.vi and xii-xiii of the Appendix of the Brief for Petitioners.

[14] These code sections are set forth at pp. xiii-xiv of the Appendix of the Brief for Petitioners.

tion] as it sees fit, and may disclose it to a number of individuals in a variety of situations, including court-ordered discovery." (Brief for Respondents, p. 85). State officers do not have discretion to either withhold or disclose information as they see fit. Plaintiffs' reference to "court-ordered discovery" (*Ibid.*) assumes the facts and law at issue.

If by virtue of State law the information is to be made available to the public (*See* Cal.Gov.Code § 6253), the state officer's duty is to disclose it upon demand. If by virtue of State law the information is not available to the public and is subject to a claim of privilege (*see* Cal.Gov.Code §§ 6254-6255; Cal. Evid.Code § 1040), the state officer's duty is to assert the confidentiality of the documents. In short, it is the state officer's duty to insure that the information will not be disclosed without a determination that the need for disclosure outweighs the need for confidentiality.

The " 'right to privacy, [is] no less important than any other right carefully and particularly reserved to the People.' (Citations omitted)." *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). Moreover, it should be noted that the Constitution of California expressly guarantees the right to privacy (Constitution of California, Art. I, § 1). State officers are no more and no less than the agents of the People (*see* Constitution of California, Art. I, §§ 24 and 26). "All such positions are trusts to be exercised from considerations of duty and for the public good." *Oscanyan v. Arms Co.*, 103 U.S. 261, 273 (1880).



Accordingly, the reasonable expectation with respect to information contained in confidential documents is that such information will not be disclosed unless it is found that the justification for disclosure clearly outweighs the reasons for confidentiality. As this expectation is reasonable, the fact that it is not an expectation of absolute privacy does not deprive it of Fourth Amendment protection. *See Mancusi v. De Forte,* 392 U.S. 364, 369-370 (1968).

### C. An Order Compelling Defendants To Produce Confidential State Documents of Which They Are the Custodians May be Challenged By Defendants on Fourth Amendment Grounds.

The protection of the Fourth Amendment is not limited solely to private papers which are possessed by a person in his individual capacity. In a variety of contexts, this Court has considered Fourth Amendment challenges by custodians of documents. *See Hale v. Henkel, supra,* 201 U.S. 43, 76-77 (1906) [custodian of corporate records]; *McPhaul v. United States, supra,* 364 U.S. 372, 382-383 (1960) [custodian of organization records]; *Mancusi v. DeForte, supra,* 392 U.S. 364, 367-370 (1968) [custodian of union records]. In *See v. City of Seattle, supra,* 387 U.S. 541, 544 (1967), this Court observed that it was now settled that a subpoena of an administrative agency for corporate books and records must meet certain standards required by the Fourth Amendment. Conversely, it is thus settled that custodians of such records may object to subpoenas if they do not meet the standards of the Fourth Amendment.

State officers hold confidential documents as fiduciaries of the Public. Unless government officers who have control over confidential documents assert the People's right to privacy, it could be effectively diluted. *Cf. Griswold v. Connecticut, supra,* 381 U.S. 479, 481 (1965). In some circumstances, to require those whose privacy might be invaded to intervene to seek to restrain compliance with a motion to produce documents might result in an abrogation of their rights at the very moment they are asserted. *Cf. N.A.A.C.P. v. Alabama,* 357 U.S. 449, 459 (1958). When it is the action of a court which might result in the denial of a constitutional right, that right may be irreparably abridged if it is not asserted by a party to the litigation. *See Barrows v. Jackson,* 346 U.S. 249, 257 (1953). Given plaintiffs' motions to compel and the district court's resulting orders, the suggestion that defendants' Fourth Amendment challenge is premature is without merit.

**D. As the Orders Compelling Production are Without Statutory or Constitutional Authorization and as They are Patently Unreasonable, They Contravene the Fourth Amendment.**

At the core of the Fourth Amendment is the requirement of an informed determination by a judicial officer that there is justification for the action which is to be taken. *See Gerstein v. Pugh,* 420 U.S. 103, 112-113 (1975); *see also See v. City of Seattle, supra,* 387 U.S. 541, 544-545 (1967). Accordingly, before compulsory process may issue, the court must find as follows: first, that it is authorized by statute; second, that the statute so construed is authorized



by the Constitution; third, that the documents sought are within the scope of the authorization; and fourth, that the specification of the documents to be produced is adequate, but not excessive, for purposes of the authorized inquiry. *See Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 209 (1946).

The orders of the district court, compelling the production of confidential state documents, issued in derogation of the Fourth Amendment because the district court abdicated its responsibility of arriving at an informed determination of these four considerations (Brief for Petitioners, pp. 58-72).

The failure of the district court to make an informed finding as to whether the orders were authorized by the Constitution is of particular significance for it constituted a failure to determine if the district court had jurisdiction to order production of all the documents. This jurisdictional cloud arises because the orders are not concerned with obtaining discovery from individual defendants, but rather with obtaining discovery from the State; the Eleventh Amendment explicitly limits federal judicial power over the states (Brief for Petitioners, pp. 61-67).

Responding to defendants' Fourth Amendment claims, plaintiffs characterize the proceedings as follows: "In this case the 'seizure', although compelled by a Federal court, operates to place documents in the hands of private citizens for use in suing the government, . . ." (Brief of Respondents, p. 86). Plaintiffs agree that the orders are concerned with obtaining discovery against the State, and assert that the

suit itself is brought against the State. As the district court has no jurisdiction over the underlying action because it is barred by the Eleventh Amendment, clearly the district court has no jurisdiction to issue the orders compelling production of confidential state documents. (Argument III, *supra,* p. 12).

Accordingly, plaintiffs' attempt to obviate defendants' Fourth Amendment claims by asserting that the orders concern "discovery of documents from the government for use against the government in civil litigation" (Brief of Respondents, p. 23) is inherently defective. The Fourth Amendment precludes the issuance of compulsory process without "the court's determination that the investigation . . . , is for a purpose Congress can order, . . . " *Okla. Press Pub. Co. v. Walling, supra,* 327 U.S. 186, 209 (1946). Federal power to authorize compulsory process against a state is necessarily circumscribed by the Eleventh Amendment. By refusing to examine the state documents *in camera,* the district court abdicated its responsibility of determining whether or not it had jurisdiction under the Eleventh Amendment to order the production of the documents. Accordingly, the orders issued in derogation of a basic requirement of the Fourth Amendment.



## VI.

### PRESENT STATUS OF THE LITIGATION IN THE DISTRICT COURT

After the filing of the second amended complaint, defendants gave notice of the requirement of a three-judge district court under Title 28, United States Code Section 2281. On October 20, 1975, the district court certified the action to the Chief Judge of the United States Court of Appeals as one appearing to require the convening of such a specially constituted court.

At a pretrial conference on October 23, 1975, plaintiffs announced that they were abandoning all claims which might call for a three-judge court and pressed for immediate trial before the single judge on the remaining claims. (See Respondents' Brief, page 6, footnote 3 ). The district court (1) set aside the previously fixed trial date, November 10, 1975; (2) directed plaintiffs to file by October 28, 1975, a memorandum setting forth the claims they were seeking to dismiss, stating the remaining relief sought and arguing their reasons why the action should not be tried by a three-judge court; (3) afforded defendants until November 3, 1975, to reply; and (4) continued further hearing until November 13, 1975.

No trial date is set before either a three-judge court or a single-judge court.

## CONCLUSION

For the above reasons, Petitioners request that the orders of the Court of Appeals, and of the district court be vacated, and that the case be remanded with directions that the underlying action in the district court be dismissed, or production of the confidential documents not be compelled without a prior *in camera* inspection and informed determination by the district court that plaintiffs' need for the documents in the action below outweighs their confidentiality.

Dated, November 6, 1975.

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*Attorneys for Petitioners.*

IN THE SUPREME COURT

OF THE

UNITED STATES

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OCTOBER TERM, 1974

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NO. 74-1023

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Supreme Court, U. S.
FILED
AUG 1 1975
MICHAEL RODAK, JR., CLERK

HENRY W. KERR, et al., Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, Respondent,

JOHN VAN GELDERN, et al., Real Parties In Interest.

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# MEMORANDUM OF RESPONDENTS CONCERNING MOOTNESS OF PENDING MATTER

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IN THE SUPREME COURT

OF THE

UNITED STATES

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OCTOBER TERM, 1974

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HENRY W. KERR, et al., Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, Respondent,

JOHN VAN GELDERN, et al., Real Parties In Interest.

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MEMORANDUM OF RESPONDENTS CONCERNING

MOOTNESS OF PENDING MATTER

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INTRODUCTION

The plaintiffs-respondents[1/] in the above-entitled case file this memorandum to advise the Court of certain facts which, in respondents' view, render this cause moot. Respondents no longer seek any of the documents which are the subject of this appeal, because the trial of this case in District Court will

1/ As herein used, "respondents" refers only to those respondents who are also real parties in interest.



be completed before this Court is able to decide issues before it, all of which concern access to documents which were to be used only for trial purposes.

SUMMARY OF THE CONTROVERSY

Defendants-petitioners in this appeal seek the reversal of two orders of the District Court for the Northern District of California which would have allowed respondents access to the central files of certain inmates of the California Department of Corrections, to the personnel files of members and certain employees of the state parole board and the Department of Corrections, and to certain other documents. These orders were issued pursuant to Rule 34 of the Federal Rules of Civil Procedure. The Court of Appeals for the Ninth Circuit refused to reverse these orders and petitioners sought a review from this Court. In their petition for writ of certiorari, petitioners raised questions concerning the power of a District Court to require an

agency of the state to produce documents when the agency says they are privileged but fails to lodge a formal claim. The petition was granted May 27, 1975.

NEW FACTS WHICH RENDER THE CASE MOOT

The following has occurred since the petition was filed in this Court. In respondents' view, they render this case moot:

On June 25, 1975, petitioners' motion for indefinite postponement of trial was denied by the District Court; and the case was set for trial on September 8, 1975. Respondents have moved for one further extension until October 15, 1975. Trial is unlikely to last longer than six weeks, and will have concconcluded long before this Court can determine the issues presently before it on certiorari. Those issues, however, are limited to respondents' Rule 34 request for the production of documents to be used at trial and the District Court's orders that they be produced solely for that purpose.



In view of the stays of those orders entered by this Court and by the Ninth Circuit, respondents have been forced to decide to either (1) go to trial without those documents or (2) postpone the trial for an entire year, while the case presently pending in this Court is argued in late Fall, the opinion announced, and the mandate issued (probably after the further disposition of a petition for rehearing). If the decision is adverse to respondents, they may well have to go to trial without these documents anyway; if favorable to respondents, a period of several additional months would obviously be required (1) for petitioners to assemble and produce the documents (and probably, under the Ninth Circuit's opinion here under review, seek some in camera inspection) and (2) for respondents then to inspect and organize the documents for use at trial.

Although these documents remain crucial to respondents' case, the consequences of post-

poning the trial for an entire year are so adverse that respondents have reluctantly decided to go to trial without them. These consequences include, but are not limited to, the fact that as time goes by (1) the substantial evidence which respondents have assembled becomes stale; (2) prospective witnesses become unavailable and must be replaced; (3) new members and hearing representatives will be appointed to the Adult Authority (some of whom must be added as defendants) and must be deposed; (4) changes to the parole-granting system, which are being made by defendants will likely require respondents to amend their complaint and probably engage in further discovery; (5) petitioners will continue to utilize new developments (as they are presently doing in the District Court) to seek further delays in the trial date; and (6) prison release dates of inmates may be delayed along with the trial. These and other problems are



exacerbated by the fact that respondents are primarily represented by foundation-supported public interest legal services organizations, which are prosecuting this case on a limited budget and which cannot afford either to prolong this litigation for an additional year or to pursue in this Court a question not dealing with the merits or trial or their underlying claims. Thus respondents have had to resolve the conflict by choosing to go to trial with the other evidence they have accumulated, even at the risk of failing to prove their case due to the absence of the crucial documents sought pursuant to Rule 34.

Since the trial in the District Court will have concluded long before this Court will have determined the case presently pending before it and since the case in this Court involves only the discovery of documents for use at that trial, the case at bench is now moot.

This Court has pointed out many times that

it has power to act only in the context of a justiciable case or controversy and thus lacks jurisdiction to review moot cases. See, for example, S.E.C. v. Medical Committee for Human Rights, 404 U.S. 403, 407, 92 S. Ct. 577, 579, 30 L.Ed.2d 560 (1972); Benton v. Maryland, 395 U.S. 784, 788, 89 S.Ct. 2056, 2059, 23 L.Ed.2d 707 (1969); and Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964). As recently as June of this year, this Court, quoting with approval from North Carolina v. Rice, 404 U.S. 244, 246 (1971), stated that federal courts do not have power "to decide questions that cannot affect the rights of litigants in the case before them." Preiser v. Newkirk, ___U.S. ___, 95 S.Ct. 2330, 2334, ___ L.Ed.2d ____, 43 U.S.L.W. 4877, 4879 (1975). Clearly, a decision by this Court in the case now before it will have no effect on the rights of the litigants, since the trial will be completed long before any decision by this Court.



This Court has made an exception to this rule to cover cases which, by their very nature, would always be terminated before the underlying rights could be heard on appeal. As Moore has written, "[i]n such cases a strict adherence to the requirements of a present controversy would leave plaintiff always suspended between prematurity and mootness." 6A J. Moore, Federal Practice, 57.13 (2d ed., 1974). This Court has applied this exception in Roe v. Wade, 401 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), which challenged the constitutionality of an anti-abortion statute, and to a number of cases which attacked election rules and procedures, including Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed. 2d 1 (1969); Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed. 2d 274 (1972); Rosario v. Rockerfeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed. 2d 1 (1973). This exception does not apply in the present appeal. The issues raised in this

appeal are not of the type which, by their very nature, would never be definitively settled on appeal. Quite the contrary, in most such cases plaintiffs-respondents would customarily need and await an appellate opinion before proceeding. The questions before this Court are mooted only because it does not pay for respondents to pursue this claim to the disputed documents under circumstances where the trial will, as a practical matter, be completed before this Court is able to decide the questions. In addition, it is the plaintiffs-respondents--the party disadvantaged by the Court's not hearing this appeal--who no longer seek the documents (because, among other reasons, the resulting delay may mean additional prison time for them).

URGENCY

Respondents respectfully call the attention of the Court to the fact that the brief on the merits has not yet been filed by respondents. Therefore a prompt decision by this Court on the mootness



of the issues on which certiorari has been granted would save both parties and the Court considerable time and expense.

CONCLUSION

If the Court now decides the questions raised in the petition in this case, it will be passing only on abstract questions of law which will have no effect on the underlying controversy.

For these reasons, respondents respectfully submit that issues raised are moot and that the order of this Court granting certiorari should be vacated and the cause remanded to the Court of Appeals for the Ninth Circuit with directions to dismiss as moot.

Dated: July 29, 1975

Respectfully submitted,

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B. E. BERGESEN, III
Attorneys for
Plaintiffs-Respondents

By Sidney M. Wolinsky
SIDNEY M. WOLINSKY

IN THE

SUPREME COURT OF THE UNITED STATES

CERTIFICATE OF SERVICE

I, SIDNEY M. WOLINSKY, attorney for respondents herein, hereby certify that, on the 31st day of July, 1975, I caused copies of this Memorandum of Respondents Concerning Mootness of Pending Matter to be served on all the parties required to be served by mailing three (3) copies in a duly addressed envelope to KARL S. MAYER, Deputy Attorney General of the State of California and attorney for petitioners herein, 6000 State Building, San Francisco, California 94102.

DATED: July 31, 1975

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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1974

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## MEMORANDUM OF PETITIONERS IN OPPOSITION TO SUGGESTION OF MOOTNESS

### PRELIMINARY STATEMENT

This action has brought before the Court two sets of decisions which involve the compelled production of confidential state documents for adversary inspection by plaintiffs in an action now pending in the United States District Court. The significance of the issues is evident from the Brief for Petitioners, filed on July 25, 1975.

Instead of submitting a brief on the merits, plaintiffs (real parties in interest in this proceeding) have sought to avoid review in this Court by filing on August 4, 1975, a memorandum asserting that the case in the district court has become moot.[1] Plaintiffs' premature suggestion of mootness, however, is based on contingencies, the occurrence and effect of which are now conjectural.

The matter has not become moot in the district court because the action is not presently set for trial; other discovery has not been completed; the appropriate court for trial has not yet been determined; the occurrence and effect of legislative action is a matter of speculation; there may be a need for further discovery; the discovery orders to be reviewed are outstanding and stayed only by these proceedings, and because plaintiffs persist in their asserted interest in the documents encompassed by these orders. The matter also is not moot in the Court of Appeals as the published opinion and order of that court remain in effect stayed only by these proceedings. There is a present case and controversy in this Court.

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**A FINAL DISPOSITION IN THE DISTRICT COURT IS NOT IMMINENT**

Plaintiffs' suggestion that the action in the district court will soon terminate is speculative, and, given the

[1]Soon after filing of this memorandum plaintiffs requested by letter that the time for filing their brief be enlarged until thirty days after a ruling that the case was not moot. However, on August 11, 1975, plaintiffs were notified by the Clerk that their brief was due on September 25, 1975.



actual posture of the proceedings in the district court, is unwarranted. The suggestion is also premature.

**1. The action is not presently set for trial.**

On July 31, 1975, in a ruling from the bench, the district court set aside the previously scheduled trial date. This action was prompted by a motion by plaintiffs for an extension of the trial date. The district court did not set a new trial date, but rather scheduled a hearing for that purpose for September 19, 1975.

**2. Answers have yet to be filed in the District Court by defendants.**

On June 25, 1975, the district court, ruling from the bench, granted plaintiffs' motion to file a second amended complaint which deletes some claims and adds new claims and seven new defendants. The second amended complaint was filed on July 1, 1975, and was received by defendants on July 7, 1975. Motions for dismissal were filed by these new defendants and the original defendants on August 6, 1975, and are scheduled for hearing on August 28, 1975. The filing of answers to the second amended complaint must await the disposition of these motions for dismissal.

**3. Discovery has not yet been completed.**

The district judge has yet to rule upon several motions by defendants to compel discovery. On June 10, 1975, the magistrate filed findings and recommendations that these motions of defendants be granted. Plaintiffs thereafter sought review before the district

judge. On July 31, 1975, ruling from the bench, the district judge remanded the matter to the magistrate for further consideration in the light of points and authorities which plaintiffs furnished to the district court but not to the magistrate. If defendants' ultimately prevail on these matters, in whole or in part, plaintiffs will be required to produce extensive material which is crucial to defendants' preparation for trial. The discovery matter is still pending before the magistrate.

In the memorandum on mootness, plaintiffs themselves express an interest in further pretrial discovery where they state: "[c]hanges to the parole-granting system, which are being made by defendants, will likely require respondents [plaintiffs] to amend their complaint and probably engage in further discoveries; . . ." (Memorandum of Respondents at 5).

Similarly, discovery by defendants with respect to the second amended complaint has not yet been undertaken.

**4. The appropriate Trial Court has not yet been determined.**

On July 8, 1975, by reason of new allegations in the second amended complaint, defendants filed notice of the requirement of a three-judge district court under Title 28, U.S.C. section 2281. Defendants have also given notice, under local court rules, that the instant case is related to another case pending in the district which also seeks to enjoin, on constitutional grounds, the California indeterminate sentence law. Both matters have not been formally ruled upon.



**5. The occurrence and the effect of any new legislation is a matter of speculation.**

In support of the plaintiffs' request that the filing of a brief on the merits be deferred pending a resolution of the issue of mootness, plaintiffs suggest that the action in the district court will become moot if certain legislation, described as Senate Bill 42, becomes law. Final legislative and executive action on this bill is a matter of speculation at this time. The bill has passed the California Senate; however, it has been in committee in the California Assembly since June 1975. The legislative session will end on September 15, 1975. Even if the bill should become law, its effect on the action may depend on the final language employed and its effective date, and this is all very conjectural at this time.

In short, any suggestion that proceedings below will render the issues presented to this Court moot is certainly premature and speculative. Given the number of items which are currently pending and unresolved, a final disposition of the action is in no way imminent.

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## A PRESENT CASE AND CONTROVERSY IS BEFORE THE COURT

The status of the case in the district court dispels any suggestion of mootness. Plaintiffs' memorandum sets forth no basis for a contrary conclusion. A present case or controversy is before the Court.

The issues before this Court focus on certain confidential state documents. Plaintiffs persist in urging

that "these documents remain crucial to respondents' [plaintiffs'] case. . . ." (Memorandum of Respondents at 4). As further stated by plaintiffs, proceeding to trial without the documents exposes plaintiffs to "the risk of failing to prove their case due to the absence of the crucial documents sought pursuant to Rule 34." (Memorandum of Respondents at 6).

In an attempt to suggest that the matter is nevertheless moot, plaintiffs state: "Respondents [plaintiffs] no longer seek any of the documents which are the subject of this appeal, *because* the trial of this case in the District Court will be completed before this Court is able to decide the issues before it, all of which concern access to documents which were to be used only for trial purposes." (Emphasis added) (Memorandum of Respondents at 1-2). This statement is a *non-sequitur*. Trial in the district court not only has not been commenced or completed, but also trial is not even scheduled. Accordingly, plaintiffs' claim that they no longer seek the documents is conditioned upon an event which has not occurred, and the time of whose occurrence is itself subject to numerous variables. *cf. City of Tacoma v. Taxpayers,* 357 U.S. 320, 333 (1958). In light of plaintiffs' continued assertion that the documents are crucial, it must be concluded that until such event has occurred plaintiffs will continue to seek the production of the documents.

Plaintiffs' request for production of documents was filed more than two years ago, on June 21, 1973 (A. 51). As is apparent from the pleadings in the Appendix in this case, plaintiffs have vigorously contested



all efforts by defendants to preclude indiscriminate disclosure of the confidential materials. Now that a definitive determination is imminent, plaintiffs state that they "cannot afford either to prolong this litigation for an additional year or to pursue in this Court a question not dealing with the merit or trial of their underlying claim." (Memorandum of Respondents at 6).[2]

Plaintiffs' assertion that it would be uneconomical to pursue their long-standing demand does not render the case moot. *See United States v. Phosphate Export Assn.,* 393 U.S. 199, 203 (1968). Voluntary discontinuance of a challenged practice does not operate to render a case moot. *See Walling v. Helmerich & Payne,* 323 U.S. 27, 43 (1944); *Trade Comm'n v. Goodyear Co.,* 304 U.S. 257, 260 (1938). Plaintiffs have consistently and vigorously contended that they were entitled to the documents and defendants have consistently objected to such production absent an *in camera* inspection to evaluate the claims of privilege and confidentiality. In the absence of a determination of the legal rights of plaintiffs and defendants, plaintiffs would be free to make analogous demands during

[2]This is not the first occasion upon which plaintiffs have sought to avoid review by representing a lack of interest in discovery theretofore demanded with vigor. Plaintiffs' response to defendants' petition for mandamus [compelled disclosure of inmate files; compelled recording of Adult Authority hearings] asserted for the first time they were no longer interested in further recordings. *See,* Brief for Petitioners, n. 6, pages 11-12. This tactic, no doubt, went far to dissuade the Court of Appeals from reaching the merits of the petition in No. 74-3392. Recordings were nevertheless resumed during April-May 1975, at plaintiffs' request, on the basis of changes instituted by the Adult Authority for parole consideration procedures effective March 1975. *See,* Brief for Petitioners, pages 21-22.

the future course of this litigation. (*See supra* n. 2, page 7). The orders of the district court, as well as the decision of the Court of Appeals, continue in effect stayed only by these proceedings. "There is thus 'an actual controversy, and adverse interests,' (citation omitted), with a 'subject-matter on which the judgment of the court can operate,' (citations omitted)." *Walling, supra,* 323 U.S. at 43.

A present case or controversy is before the Court. The observation by this Court in *S. W. Sugar Co. v. River Terminals,* 360 U.S. 411, 415-416 (1959), is eqaully applicable to this case: "The issue is one of importance in the development of the law . . . , as to which we have large responsibilities, constitutionally conferred; it is squarely presented on the record before us; and the exigencies of this litigation clearly call for its resolution at this stage."

---

**CONCLUSION**

The gist of plaintiffs' memorandum is the possibility that the district court action will culminate sometime in the Fall of 1975 and that the case pending before this Court will not be resolved for "an entire year". (Memorandum of Respondents at 3-6). As disclosed above, the current posture of the proceedings in the district court does not indicate that final disposition is imminent. On the other hand, proceedings in this Court could be resolved expeditiously under the current briefing schedule. As plaintiffs continue to assert that the documents are crucial and that their



absence threatens an adverse result in the district court, they should be expected to seek an appropriate stay in the district court.

There is a present case and controversy; this action is not moot. The due administration of justice requires the disposition of the merits of this action. If, however, this Court concludes that the matter is moot, petitioners respectfully request that the decisions and orders below be vacated, and that petitioners recover their costs in this Court.

Dated, August 12, 1975.

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MOTION FILED

APR 13 1976

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1975

## No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

## SUPPLEMENTAL BRIEF FOR PETITIONERS and MOTION FOR SPECIAL LEAVE TO FILE

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# In the Supreme Court
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OCTOBER TERM, 1975

No. 74-1023

HENRY W. KERR, et al., *Petitioners,*

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, *Respondent,*

JOHN VAN GELDERN, et al., *Real Parties in Interest.*

## PETITIONERS' MOTION FOR SPECIAL LEAVE TO FILE SUPPLEMENTAL BRIEF (RULE 41)

Pursuant to Rule 41, subdivisions 5 and 6, Supreme Court Rules, petitioners, defendants below,[1] respectfully request special leave to file the annexed Supplemental Brief. The case was argued and submitted to this Court on November 11, 1975.

Defendants' supplemental brief presents intervening circumstances which, defendants believe, purge the district court of jurisdiction in the underlying action. These circumstances have occurred after No-

[1]For clarity, the parties are hereinafter designated as defendants or plaintiffs according to their positions in the action in the district court. Defendants are the members of the California Adult Authority and the Director of Corrections and are petitioners in the case before this Court. Plaintiffs below are all male felons in prison or on parole and are the real parties in interest before this Court. The United States District Court for the Northern District of California is the respondent in this action before this Court.

vember 11, 1975, and include two major amendments to the complaint, and dissolution of the three-judge district court as no longer necessary to the action as amended.

These changes, which have resulted directly from orders of the district court, were intended by plaintiffs who made considered motions to amend the complaint to abandon relief at prison disciplinary proceedings, to relinquish all injunctive relief, and to then dissolve the three-judge court as unnecessary to the action as amended. Defendants have not sought interlocutory review of these orders in the United States Court of Appeals for the Ninth Circuit, and do not, by this Supplemental Brief, seek review of them in this Court. Rather, defendants present these changes as intervening facts which eradicate jurisdiction in the district court. The matters raised in the Supplemental Brief were presented to the district court in defendants' responses to plaintiffs' motions.

Dated, April 7, 1976.

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Deputy Attorney General,
*Attorneys for Petitioners.*

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JOHN VAN GELDERN, et al., *Real Parties in Interest.*

## SUPPLEMENTAL BRIEF FOR PETITIONERS

### SUMMARY OF ARGUMENT

On three occasions after certiorari was granted the district court permitted plaintiffs to make major substantive amendments to their complaint. The last two amendments occurred after argument and submission in this Court on November 11, 1975. Over defendants' objection, the district court has granted plaintiffs' motion to dissolve the three-judge court as unnecessary to the action as amended.

As changed, the action below is now a class action before a single district judge for a declaratory judgment that California's parole consideration-term

fixing procedures are unconstitutional. The changes, deliberately orchestrated by plaintiffs, have purged the district court of any tenable basis for jurisdiction in the action.

The individual claims of the named plaintiffs are no longer cognizable in the district court. As each of the named plaintiffs has been completely discharged from custody, or released on parole, their individual claims have either become moot, and, therefore, barred by Article III, section 2 of the Constitution, or are so remote and insignificant that declaratory relief clearly should be denied even were there power to hear the case.

Without jurisdiction over the individual claims of the named plaintiffs, maintenance of the class action is necessary to the jurisdiction of the district court. *Sosna v. Iowa*, 419 U.S. 393 (1975).[1] The action may proceed as a class action under Rule 23(b)(2) only if plaintiffs' claims make final injunctive relief, or corresponding declaratory relief appropriate. Plaintiffs have intentionally relinquished all injunctive relief.

As plaintiffs have relinquished all injunctive relief, their class action is not maintainable unless the other requisite of Rule 23(b)(2) is met, i.e., unless the

[1] In August 1974 the district court determined the action is maintainable as a class action under Rule 23(b)(2), and defined the class as all adult male felons in prison or on parole in custody of the Department of Corrections now or in the future. On February 5, 1976, the district court denied defendants' countermotions for reconsideration of whether the action should proceed as a class action, and for reconsideration of definition of the class.



declaratory relief sought "corresponds" to final injunctive relief. To correspond to injunctive relief, within the meaning of Rule 23(b)(2), declaratory relief must itself have the practical effect of an injunction, or form the basis for an injunction. If the declaratory relief sought by plaintiffs meets either test, it necessarily also meets the requirements of 28 U.S.C. §§2281-2284 and can not be granted unless heard and determined by a three-judge court.

But plaintiffs not only do not have a three-judge court, they do not want one and have gone to extraordinary lengths to avoid all but the single judge. When, over plaintiffs' objections (CDE Nos. 255, 260),[2] a three-judge court was convened, plaintiffs promptly changed the action by relinquishing most of the relief they had sought, and successfully moved to dissolve the court and achieve remand to the single judge for all further proceedings.

As this result was precipitated designedly by plaintiffs they should be bound by it. As the class action is maintainable only before the three-judge court which plaintiffs have forsaken intentionally and over defendants' objections, and as the individual claims of the named plaintiffs are no longer cognizable in the district court, the single district judge lacks juris-

[2] "CDE" refers to the clerk's docket entries by the clerk of the United States District Court in the docket sheet in the action below. Two copies of this docket sheet were sent to the clerk of this Court as Exhibit A attached to a letter to the clerk dated March 5, 1976 sent by petitioners in response to a telephonic inquiry of March 2, 1976 of the status of the case in the district court. A copy of this letter with attachments was sent the same date to the other parties.

diction to proceed with the action. Accordingly, defendants request that this Court vacate the decisions below and remand the matter with directions that the complaint in the district court be dismissed.

---

## ARGUMENT

### I

### THE NATURE AND SCOPE OF THE UNDERLYING ACTION HAVE CHANGED TO A POINT WHERE THE DISTRICT COURT IS NOW WITHOUT JURISDICTION.

#### A. Summary Of Plaintiffs' Changes To The Action

When the discovery orders under review were issued on August 12, 1974 (A.367)[3] and on December 3, 1974 (A.647) the action in the district court was a class action for declaratory relief and injunctive relief at (1) parole date recision proceedings; (2) parole revocation proceedings; (3) prison disciplinary proceedings; (4) parole reconsideration-term fixing proceedings. The text of the original complaint is printed in the single appendix at A.8-50.

After certiorari was granted on May 27, 1975, the district court has permitted plaintiffs three major amendments to the complaint:

**1. Plaintiffs' abandonment of relief at parole date recision proceedings, and at parole revocation proceedings.**

Upon plaintiffs' motions granted on June 25, 1975, plaintiffs, on July 1, 1975, filed a second amended

[3] "A." refers to the printed single appendix filed in this case.



complaint which expanded the nature of the relief sought by the plaintiff class, but narrowed the proceedings to which the relief would apply to (1) prison disciplinary proceedings and (2) parole consideration-term fixing proceedings. Relief at parole date recision proceedings, and at parole revocation proceedings was abandoned in this amended complaint. This change in the action is discussed in more detail in the Brief For Petitioners, pages 24-26.

In October 1975 a three-judge district court was convened in the action below on notice of the district judge filed October 20, 1975 (CDE No. 303), and order of the United States Court of Appeals filed October 28, 1975 (CDE No. 321).

**2. Plaintiffs' abandonment of relief at prison disciplinary proceedings.**

On November 20, 1975 the single district judge granted plaintiffs' motion to amend their complaint to further narrow the relief sought and the proceedings to which relief would apply by abandoning injunctive relief at prison disciplinary proceedings and focussing the action to declaratory and injunctive relief at parole consideration-term fixing proceedings. Plaintiffs' intent to so amend the complaint was first described in open court in the district court on October 23, 1975 and was discussed further at the proceedings on November 20, 1975. Copies of the reporter's transcripts of these proceedings on October 23 and November 20, 1975 were attached as Exhibits B and D respectively to petitioner's letter to the clerk of this court dated March 5, 1976.

3. **Plaintiffs' relinquishment of all injunctive relief.**

On December 18, 1975 plaintiffs filed a notice for hearing before the three-judge court of motions to further amend the complaint to abandon all requests for injunctive relief and to dissolve the three-judge court as unnecessary to the action as thus amended (CDE No. 333). A copy of plaintiffs' moving papers were attached as Exhibit F to petitioner's letter to the clerk of this court dated March 5, 1976. On January 29, 1976 plaintiffs' motions were calendared for hearing by the single judge on February 5, 1976 (CDE 342).[4]

At the conclusion of the hearing on February 5, 1976 the single district judge granted plaintiffs' amendment to the complaint. By order dated and

[4]On January 30, 1976 defendants filed countermotions to plaintiffs' motions to amend and dissolve. Defendants countermotions were addressed to the three-judge court, and included requests to put the action off calendar pending disposition of the case pending in this Court, and pending disposition of pending state administrative proceedings on reconsideration and codification of all Adult Authority procedures pursuant to a new state statute effective January 1, 1976. Other countermotions called for dismissal or other limitations of the action, for review by the full court of certain previous actions by the single judge, and for retention of jurisdiction by the three-judge court to hear and determine the matter even as limited to declaratory relief. (CDE Nos. 338, 339). On February 2, 1976, defendants filed in the district court a special memorandum concerning jurisdiction of the single judge to narrow the action or to order dissolution of the three-judge court, and requesting that plaintiffs' motions to amend the complaint be heard by the full court (CDE No. 340). Copies of defendants' countermotions were attached as Exhibit H, and copies of defendants' special memorandum were attached as Exhibit I to defendants' letter to the clerk of this Court dated March 5, 1976.



stamped filed February 5, 1976,[5] it appears that the three-judge court has granted plaintiffs' amendments to the complaint, denied defendants' countermotions, granted plaintiffs' motion to dissolve the three-judge court, and remanded the matter to the single district judge for all further proceedings. A copy of this order is annexed in the appendix to this Supplemental Brief, page i. The text of the complaint as amended was filed February 24, 1976, and is annexed in the appendix to this Supplemental Brief, pages ii-xxxix.

As changed, this action is now a class action before a single district judge for a declaratory judgment that state parole consideration-term fixing proceedings are unconstitutional.[6] On April 8, 1976 the district court ordered that the case is set for trial on July 5, 1976.

These changes have purged the district court of any tenable basis for jurisdiction in the action. To sustain the class action the relief sought must "correspond" to an injunction in order to meet the requirements of

[5]Although convened by order of the Court of Appeals filed October 28, 1975, and dissolved by its own order dated February 5, 1976, the three-judge district court has never sat in open court and counsel were never permitted to appear before the full court. Only the single district judge attended the proceedings on February 5, 1975.

[6]Monetary relief has never been sought by plaintiffs. As the action below has involved only challenges to proceedings at which the defendants exercise official judgmental discretion in a quasi-judicial capacity it would appear that monetary relief would be barred by their immunity from liability in damages in an action initiated under 42 USC § 1983, see, *Pierson v. Ray*, 386 U.S. 547 (1967), and by the Eleventh Amendment to the Constitution of the United States.

Rule 23(b)(2). If the relief sought by plaintiffs' class meets this test, it necessarily also comes within 28 USC §2281 and cannot be granted by a single district judge. Accordingly, the class action can not be maintained before the single district judge. Maintenance of the class action is necessary to jurisdiction in the district court because the named plaintiffs' individual claims for declaratory relief are each moot. A three-judge court is not available to hear the class action because one was convened and then dissolved by unanimous order of the three judges upon plaintiffs' motions to amend the complaint and to dissolve the court. Defendants have not sought review of this order, nor have plaintiffs sought review of the three judge order which granted their motions. As the district court is without jurisdiction in the action, the complaint should be dismissed.

**B. In this Case, Declaratory Relief Sufficient To Support A Rule 23(b)(2) Class Action Can Not Be Heard and Determined By A Single District Judge.**

By order filed August 1, 1974, the district court determined the action below is maintainable as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[7] (A.369-370). Under this provision, a class action is permissible only where final injunc-

[7]Rule 23(b)(2) provides:

"(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or *corresponding* declaratory relief with respect to the class as a whole;" (Emphasis added).



tive relief or corresponding declaratory relief is appropriate.

The word "corresponding" has meaning, and is not mere surplusage which may be ignored. According to the Notes of Advisory Committee on Rules:

> "Declaratory relief 'corresponds' to injunctive relief [within the meaning of Rule 23(b)(2)] when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief." United States Code Annotated, Title 28, Federal Rules of Civil Procedure, Rule 17 to 23.2, page 298.

There are three possible effects of the declaratory relief sought by plaintiffs: the declaratory judgment may have no effect, or be merely advisory; the relief may itself be tantamount to an injunction to affect directly and tie the hands of the Adult Authority; or the declaration might be presented with assertions of res judicata or collateral estoppel to a three-judge court for an actual injunction. Declaratory relief which has no effect, or is merely advisory should be denied.[8] Such relief would not resolve the rights of the parties, would not involve any significant interest of sufficient immediacy to warrant exercise of the court's equitable jurisdiction, and would not involve a justiciable case or controversy.

The remaining alternatives would be injunctive in fact and declaratory in name only. The most prob-

[8]Also, such limited declaratory relief would be insufficient to "correspond" to an injunction, could not meet the requirements of Rule 23(b)(2), and could not sustain the class action which is necessary to the jurisdiction of the district court.

able effect of the relief sought by plaintiffs is an injunction. As the class of plaintiffs includes every adult male felon in prison or on parole, now or in the future, a declaration that the Adult Authority procedures violate the Constitution necessarily would affect each and every such proceeding in California. Thousands of these proceedings are conducted each year according to rules, regulations, and procedures adopted formally by the Adult Authority pursuant to California state statutes.[9] The declaration would burden every proceeding because every prisoner coming before the Adult Authority would be a member of the class of plaintiffs to whom the benefit would run, and the Chairman and members of the Adult Authority are defendants to whom the burden would run. Standing alone, such declaratory relief would be tantamount to injunction by requiring defendants to comport to it under pain of summary negation of any action taken with respect to any California prisoner in prison or on parole.[10] An actual injunction would add only the threat of contempt to plaintiffs' arsenal.

[9]The text of the formally adopted procedures, rules, and regulations, and of the state statute according to which they must be codified, were furnished to the district court, and are included in the attachments to defendants' letter to the clerk of this Court dated March 5, 1976, as Exhibits A, B, and C of Exhibit H (Defendants' Countermotions, etc).

[10]Defendants might also be subject to damage actions for wilfull infringement of Constitutional rights announced in the declaration. Collateral estoppel or res judicata would be urged by plaintiffs to bar defendants from going behind the declaration, and defenses of official quasi-judicial discretion, or good faith would be difficult if not impossible to prove in the face of the unassailable declaration. See, *Mattis v. Schnarr*, 502 F.2d 588, 592-593 (8 Cir. 1974).



It should not be assumed this is necessary to persuade defendants to comply with the Constitution.

Plaintiffs might seek to use the declaration as the basis for later injunction. Plaintiffs would present the declaratory judgment to a three judge tribunal as *fait accompli* with assertions of res judicata or collateral estoppel, and seek an injunction on some summary showing that defendants acted without having comported to the declaration. If the declaratory judgment were granted res judicata effect,[11] the ambit of the three judge tribunal would be narrowed to the nearly ministerial task of issuing the injunction on the basis of a single judge's determinations beyond their pale. This would subvert the clear intent of Congress that such an injunction shall not issue unless the full court has "heard and determined" the matter. 28 USC §§2281, 2284. See, Currie, *The Three-Judge District Court In Constitutional Litigation,* 32 U.CHI.L.REV., 1, 13-20 (1964).

This procedure would also narrow the appellate jurisdiction of this Court. A three-judge court order granting or denying the injunction would be reviewable on direct appeal to this Court. 28 USC §1253. But such review would not reach the single judge's declaratory judgment because the doctrines of res judicata or collateral estoppel would have barred the three judge court from going behind it. Separate review in the Court of Appeals (28 USC §§1291, 2201) of the

[11]Without a res judicata effect, the declaration could not form the "basis" for such latter injunctive relief, would not "correspond" to injunction, and, therefore, would be insufficient to meet the requirements of Rule 23(b)(2) to sustain the class action.

single judge's declaratory judgment would improperly abridge defendants' right to full review of a three judge court injunction on direct appeal to this Court under 28 USC §1253.

The effective similarities of broad declaratory relief, such as is sought by plaintiffs, and actual injunction was recognized by this Court in *Samuels v. Mackell*, 401 U.S. 66, 72-73 (1971). A single judge declaratory judgment which itself effects injunction, or which has a res judicata effect upon application for a three-judge court injunction, would frustrate completely the clear intent of Congress in enacting 28 U.S.C. sec. 2281:

> "To bring this procedural device into play—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident statewide doom by a federal court of a state's legislative policy. This was the aim of Congress . . ." *Phillips v. United States*, 312 U.S. 246, 251 (1941).

The problem of the res judicata effect of such a declaratory judgment as highlighted in *Nixon v. Richey*, 513 F.2d 430, 438 (D.C.Cir. 1975), was emphasized to the district court in this action in Defendants' Supplemental Memorandum filed February 2, 1976 (CDE



No. 340).[12] In another context, Justices of this Court have expressed differing views of whether a declaratory judgment may be granted res judicata effect to obtain an injunction. In *Steffel v. Thompson*, 415 U.S. 452 (1974), compare the separate concurring opinion of Mr. Justice Rehnquist, joined by the Chief Justice, 415 U.S. at 478-485, with the concurring opinion of Mr. Justice White, 415 U.S. at 476-478. But *Steffel* lacked the class action considerations which, in this case, necessarily highlight a nexus between Rule 23(b)(2) and 28 U.S.C. §2281.

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), this Court recognized but declined to reach the question: "Whether an action solely for declaratory relief would under all circumstances be inappropriate for consideration by a three-judge court we need not now decide, for it is clear that in the present case, the Congressional policy underlying the statute [28 USC §2281] was not frustrated by trial before a single judge." 372 U.S. at 154. In the class action now pending before the single judge, the declaratory relief sought by plaintiffs is a link which connects Rule 23(b)(2) with 28 USC §2281, and will necessarily frustrate such Congressional policy if it is heard and determined by a single judge.

For the above reasons the single district judge has no jurisdiction to hear and determine plaintiffs' class action for a declaratory judgment the practical effect

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[12] A copy of the text of this special memorandum of defendants was attached as Exhibit I to defendants' letter to the clerk of this Court dated March 5, 1976.

of which would be to enjoin an entire statewide administrative scheme formally adopted by the California Adult Authority pursuant to state statute. Similarly, a declaratory judgment issued by the single judge could not be granted a res judicata effect to form the basis for a subsequent injunction by a district court of three judges. Without the practical effect of injunction, and without a res judicata effect, the single district judge's declaratory judgment could not "correspond" to injunctive relief.

The three-judge court having been dissolved recently upon plaintiffs' motion for dissolution and order signed by the three judges, the single judge district court does not have jurisdiction to proceed with the class action, and may proceed only insofar as it has cognizance over the individual claims of the named plaintiffs. For the reasons which follow, the district court also lacks jurisdiction over the action thus constituted.

**C. The Action Below Is Moot as to Each Named Plaintiff.**

The original complaint was filed in the district court in November 1972 by seven state prison inmates: (1) John Van Geldern; (2) Danny Jones; (3) Charles Edward Van Nort; (4) Billy Ray Lewis; (5) Robert Newton Gardner, Jr.; (6) James Murrin; (7) George Chatfield. No named plaintiffs have been added to the action.

On December 20, 1974 Billy Ray Lewis was discharged from his commitment; Robert Newton Gardner, Jr. was discharged from his commitment on August 5, 1975; and John Van Geldern was discharged on August 20, 1975. George Chatfield was released on parole July 26, 1975 and Charles Edward Van Nort was released on parole after a determination on August 27, 1975 that he may be released upon approval of a parole plan.[13] James Murrin has been dismissed from the action by order of the district court, filed October 6, 1975 (CDE 291) on stipulation of counsel. In June 1975 Danny Jones was granted parole effective April 4, 1976.[14] Jones' release was subsequently advanced and he was released on parole on January 27, 1976. The last proceeding involving the plaintiff Jones to which reference is made in the complaint was a parole consideration proceeding which occurred in May 1972. The amendments to the complaint include no reference or challenge to the procedures followed, or the result reached, at the June 1975 parole consideration proceeding at which Jones was granted parole effective April 4, 1976.



The dismissal of Murrin, of course, eliminates his allegations from the action as is apparent from the text of the complaint as amended which makes no reference to him. The discharge of Van Geldern, Lewis and Gardner moots the allegations and claims

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[13]These facts were presented to the district court in an affidavit of defendant Raymond K. Procunier, Chairman of the California Adult Authority, attached as Exhibit D to defendants' countermotions filed in the district court January 30, 1976 (CDE No. 338). These countermotions, together with the exhibits attached thereto, were attached as Exhibit H to defendants' letter to the clerk of this Court dated March 5, 1976.

[14]This fact is set forth in paragraph No. 10 of the January 23, 1976 affidavit of Raymond K. Procunier to which reference is made in footnote 13 above.

of those named plaintiffs. *Weinstein v. Bradford,* ..... U.S. ....., 44 U.S.L.W. 3372 (No. 74-1287; December 10, 1975).[15]

The release on parole of named plaintiffs Chatfield, Jones, and Van Nort also renders moot their individual claims. Relying on *Sosna v. Iowa,* 419 U.S. 393 (1975), this Court in *Weinstein v. Bradford, supra,* stated that in the absence of a class action[16] the "capable of petition yet evading review" doctrine was limited to the situation where two elements combined: (1) A challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subject to the same action again. Plaintiffs Chatfield, Jones, and Van Nort, having been released on parole, could be subject to future parole consideration proceedings only if they (1) violated parole; (2) had their parole revoked on the basis of that violation, and (3) were ordered by the Adult Authority returned to prison because of such violation.[17] In defendants' view, there

[15]Plaintiffs do not seek monetary relief in this civil rights action and, as indicated above, have relinquished all injunctive relief.

[16]For the reasons set forth above, the action below, while certified as a class action, cannot proceed before the single district court as a class action. With respect to this circumstance defendants emphasize that it was upon plaintiffs' motion to amend the complaint, and affirmative motion to dissolve the three-judge district court as unnecessary to the action as amended, which precipitated an actual dissolution of the three-judge court necessary to maintenance of the action as a class action for the declaratory relief sought by plaintiffs.

[17]Of course, any such parole revocation proceedings would comport to the requirements of due process established in *Morrissey v. Brewer,* 408 U.S. 471 (1972), and *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). Chatfield, Jones and Van Nort, could also be returned to prison on a new felony conviction and sentence, but we have already established that, under *Weinstein v. Bradford,* supra, this is not a possibility which can save their claims from mootness.



is not a "reasonable expectation," or "demonstrated probability" [*Weinstein v. Bradford, supra*] that these named plaintiffs will violate their parole, be revoked, and returned to prison.[18]

The possibility of the named plaintiffs who have been released on parole (Van Nort, Jones and Chatfield) of being subject in the future to parole consideration-term fixing proceedings is a matter of speculation and conjecture, and is not of sufficient immediacy and reality to warrant invocation of the equitable jurisdiction of the district court. See *Steffel v. Thompson,* 415 U.S. 452, 460 (1974); *O'Shea v. Littleton,* 414 U.S. 488, 496-499 (1974). The named plaintiffs individual claims for declaratory relief are, there-

[18]By their amendments to the complaint filed July 1, 1975 plaintiffs abandoned their challenge against parole date recision proceedings, and by the amendments of November 1975 abandoned the relief sought with respect to prison disciplinary proceedings. Under California state law, parole date recision proceedings are now attended by the due process safeguards articulated both in *Morrissey v. Brewer, supra,* and in *Gagnon v. Scarpelli, supra. In re Prewit,* 8 Cal.3d 470, 503 P.2d 1326 (1972); *Gee v. Brown,* 14 Cal.3d 571, 536 P.2d 1017 (1975). The prison disciplinary proceedings the result of which would form the basis for the parole date recision proceeding would be attended by the due process rights articulated in *Wolff v. McDonnell,* 418 U.S. 539 (1974), subject to any clarification which may appear in this Court's opinion in *Enomoto v. Clutchette,* No. 74-1194 (argued December 15, 1975) 44 U.S.L.W. 3372. Finally, under new regulations promulgated by the Director of Corrections and by the Adult Authority, major disciplinary proceedings involving an inmate who has been given a parole release date are combined with parole recision proceedings so that as a matter of California state law, the due process standards articulated in *Morrissey* and in *Scarpelli* would attend any combined disciplinary-recision proceedings.

fore, moot or non-justiciable. Justiciability is made the more remote by plaintiffs representations to this Court that they do not attack the correctness of any agency decision and do not seek to challenge or overturn any administrative decision by the underlying litigation in the district court. Respondents' Brief, pages 22-23, 78.

**D. As the Action Focuses On Parole Consideration-Term Fixing Proceedings, Which Concern Exclusively Administrative Determinations Of State Custody, Federal Jurisdiction Must Be Founded On 28 USC §2254 And Not On 42 USC §1983.**

Plaintiffs, by their affirmative motions, have focused the action in the district court on parole consideration-term fixing proceedings. These administrative proceedings relate exclusively to determinations of state custody. At page 6, footnote 3 of Respondents' Brief filed in this Court, plaintiffs asserted that their action in the district court is "concerned solely with the term fixing, parole granting hearings . . ." conducted by the Adult Authority. Plaintiffs subsequent amendments to the complaint have formally adjusted the action to comport to that representation.

By relinquishing claims for relief at prison disciplinary proceedings, and by relinquishing all claims for injunctive relief, plaintiffs have strengthened the basis for defendants' argument presented under Argument IV, pages 15-17, of the Reply Brief of Petitioners filed in this Court. In short, the district court lacks jurisdiction under Title 42 USC §1983 to litigate challenges to proceedings the exclusive concern of which is the duration of custody of state prisoners. *Preiser v. Rodriguez*, 411 U.S. 474 (1973).



## II

**BY LIMITING THEIR ACTION TO DECLARATORY RELIEF UNDER 28 USC §2201, PLAINTIFFS MAY BE DENIED PERMISSION TO PROCEED: SUCH PERMISSION SHOULD BE WITHHELD FOR PREVAILING CONSIDERATIONS OF EQUITY, COMITY AND FEDERALISM.**

The remedy of declaratory judgment created by Title 28 USC §2201 confers discretion on the courts rather than an absolute right upon a litigant. *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 241 (1952). Whether to entertain a suit for declaratory judgment rests in the sound discretion of the courts, and, unlike other civil actions, the conclusion that the court has the power to hear the action does not require the court to proceed. *Public Affairs Associates v. Rickover*, 369 U.S. 111, 112 (1962). The object of section 2201 is to afford a new form of relief where needed, and not to furnish a new choice of tribunals or to draw into the federal courts the adjudication of causes properly cognizable in other proceedings. See *Aetna Casualty and Surety Company v. Quarels*, 92 F.2d 321, 324 (4th Cir. 1937); *Fireman's Insurance Co. v. Riley*, 322 F.2d 349, 352 (W.D.Ken. 1972). Although a suit for declaratory judgment is brought under a statute, it is nevertheless essentially an equitable cause of action, and Congress explicitly contemplated that the court would decide to grant or withhold declaratory relief on the basis of traditional equitable principles. See, *Samuels v. Mackell, supra*, 401 U.S. 66, 70 (1971). Considerations of a proper federal-state relationship, and traditional notions of comity and federalism, should also be taken into account in con-

sidering whether a plaintiff may properly proceed with an action for declaratory judgment. See, *Public Service Commission v. Wycoff Company, supra,* 344 U.S. at 247.

Plaintiffs' available adequate remedies include federal and state habeas corpus proceedings, as well as state administrative proceedings and state declaratory judgment proceedings.[19] The intrusive effect of this action on federal-state relations is emphasized by plaintiffs' additional demand that the district court exercise pendant jurisdiction to declare the procedures invalid under state law. Typically a declaratory judgment action is an expeditious proceeding involving only an issue of law or undisputed, or relatively undisputed facts, and it may operate frequently as a summary proceeding. Notes of Advisory Committee on Rules, Rule 57. But the trial pending in the district court could not be more atypical inasmuch as, in response to an inquiry from the single district judge, plaintiffs recently (February 17, 1976) listed 95 witnesses they intend to call at trial and estimated their case will require 24 court days. Defendants listed 44 witnesses they will call and estimated that direct examination of their witnesses will require 15 court days. These estimates assume respective counsel will stipu-

[19]Although the availability of other adequate remedies may not necessarily preclude declaratory relief in cases where it is appropriate (Rule 57, Federal Rules of Civil Procedure), defendants submit that such other remedies may be taken into account where, as here, they are more complete (e.g., habeas corpus); more expeditious; less intrusive on a proper federal-state relationship, and where denial of the equitable relief will not irreparably injure plaintiffs. See, *Rivera v. Freeman,* 469 F.2d 1159, 1164 (9 Cir. 1972).



late into evidence a substantial number of documents which will include the rules, regulations, procedures, manuals, and forms relating to the construction of, and access to, inmate files; to Adult Authority proceedings, and to the information considered at such proceedings. The action will thus not only cast a very substantial burden on the federal trial court, but will cast a similar burden on the United States Court of Appeals, where review most assuredly will be sought from any decision of the district court. Review of a declaratory judgment is de novo on the record, and the appellate court may substitute its judgment for that of the trial court. *Delno v. Market Street Railway Company,* 124 F.2d 965 (9th Cir. 1942).

Whether declaratory relief is appropriate under the circumstances of a particular case in a district court may be considered, even in the first instance, in this Court. *Public Service Commission v. Wycoff Company, supra,* 344 U.S. 237, 241 (1952). The district court is in no better position than this Court to make this determination in this case, and defendants urge this Court to reach the question and to determine that such relief is inappropriate. According to a recently enacted state statute effective January 1, 1976,[20] all rules, regulations, resolutions and policy statements of the Adult Authority must actually be reconsidered at public hearings and formally promulgated and codified by July 1, 1976. The same statute (section 2 thereof)

[20]California Statutes 1975, Chapter 1160. A copy of the text of this statute is attached as Exhibit A of defendants' countermotions, etc. which is Exhibit H attached to defendants' letter to the clerk of this Court dated March 5, 1976.

makes applicable to the Adult Authority rules, etc., the provisions of California Government Code sections 11371 through 11445 which prescribe a procedure for adoption of regulations; entitle any interested person to petition the Adult Authority to adopt, amend or repeal any such regulation [Government Code section 11426, 11427], and entitle any interested person to obtain state declaratory relief with respect to the validity of any regulation (Government Code section 11440).[21]

For the above reasons, defendants submit declaratory relief is inappropriate in the action in the district court.

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## CONCLUSION

For reasons heretofore urged by defendants in their briefs filed in this Court, the discovery orders of the district court are invalid. In addition, by reason of changes in the action wrought at the behest of plaintiffs and on order of the district court, the district court has no jurisdiction in the underlying action of which the discovery orders being reviewed are a part. Without such jurisdiction the district court cannot take steps to comport to a decision of this Court on remand.

Moreover, even if the district court had the power to hear plaintiffs' action for declaratory judgment, such relief is inappropriate under the circumstances of this case and should be withheld.

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[21]The full text of California Government Code sections 11371-11445 is attached as Exhibit B to defendants' countermotions, etc., filed in the district court and attached as Exhibit H to defendants' letter to the clerk of this Court dated March 5, 1976.



For the above reasons defendants respectfully request that the decisions of the Court of Appeals and the discovery orders of the district court be vacated, and that the case be remanded with directions that the complaint in the district court be dismissed. See, *Weinstein v. Bradford, supra,* ..... U.S. ....., 44 U.S.L.W. 3372 (1975); *Board of School Commissioners of the City of Indianapolis v. Jacobs,* 420 U.S. 1298 (1975); *United States v. Munsingwear Inc.,* 340 U.S. 36 (1950).

Dated, April 7, 1976.

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**(Appendix Follows)**

# Appendix

Appendix

## Appendix

In the United States District Court for
the Northern District of California

No. C-72-2088 SAW

John Van Geldern, et al., Plaintiffs,

vs.

Henry W. Kerr, et al., Defendants.

[Filed Feb. 5, 1976]

### ORDER

It Is Hereby Ordered for good cause shown:

1. Plaintiffs' motion to amend their complaint is granted.

2. Plaintiffs' motion to dissolve the three-judge court is granted.

3. Defendants' countermotions filed and dated January 29, 1976, are hereby denied.

4. This case is hereby remanded to District Judge Stanley A. Weigel, the original single Judge in this matter, for all further proceedings.

Dated: 2/5/76

/s/ Anthony M. Kennedy
Circuit Judge

/s/ Spencer Williams
District Judge

/s/ Stanley A. Weigel
District Judge

[Designation of Offices of Attorneys for Plaintiffs Omitted in Printing]

In the United States District Court for the Northern District of California

No. C 72-2088 SAW

John Van Geldern, et al., Plaintiffs,

vs.

Henry W. Kerr, et al., Defendants.

[Filed February 24, 1976]

# SECOND AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS, FOR DECLARATORY RELIEF

## JURISDICTION

1. This is a civil action brought by plaintiffs on behalf of themselves and all others similarly situated under Section 1343 of Title 28 of the United States Code, to redress the deprivation of rights, privileges and immunities secured to them by the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. Pursuant to 42 U.S.C. Sections 1983 and 1988 and 28 U.S.C. Sections 2201 and 2202, plaintiffs seek declaratory relief to remedy the unconstitutional conduct of defendants complained of herein. In addition, plaintiffs invoke the pendant jurisdiction of this Court, inasmuch as such conduct also violates the Constitution and Statutes of the State of California.



## PARTIES

2. Plaintiffs JOHN VAN GELDERN, ROBERT NEWTON GARDNER, JR., and BILLY RAY LEWIS, who were prisoners in custody of the Department of Corrections of the State of California (hereinafter the "Department"), are presently on parole in the custody of the Department. Plaintiffs DANNY JONES and CHARLES EDWARD VAN NORT are prisoners in the custody of the Department and are presently confined at the California Men's Colony at San Luis Obispo, California. Plaintiff GEORGE CHATFIELD is a prisoner in the custody of the Department presently confined at the California State Prison at San Quentin.

3. Plaintiffs bring this action as a class action, on behalf of themselves and all adult male felons who are now, as well as all adult male felons who in the future will be, in the custody of the Department, whether confined in an institution operated by the Department or on parole. As to such class of persons, it is so numerous that the joinder of all members is impracticable; there are questions of law and fact common to the class; the claims of the named plaintiffs herein are typical of the claims of the class, and plaintiffs will fairly and adequately protect the interests of the other members of the class. In addition, the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members thereof which would as a practical matter be dispositive of the interests of the other members not parties to the

adjudications, or substantially impair or impede their ability to protect their interests; and, the parties opposing the class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

4. Defendants R. K. PROCUNIER, R. C. BROWN, R. C. GARCIA, J. H. HOOVER, H. W. KERR, C. O. LYNUM, MANUEL QUEVEDO, JR., R. L. RUSHEN, and R. G. WOOD are members of the California Adult Authority, and W. J. LEON, JR., is Administrative Officer of the Adult Authority. In addition, R. K. PROCUNIER was, at all times material prior to his appointment as Chairman of the California Adult Authority in January of 1975, Director of the California Department of Corrections. MANLEY J. BOWLER, WALTER A. GORDON, JR., LELAND M. EDMAN, CHARLES E. BROWN, and DANIEL LOPEZ were, at the time this action was initially filed and for various periods thereafter, members of the Adult Authority; and defendant JOSEPH A. SPANGLER was, at the time this action was initially filed and until January of 1975, the Administrative Officer of the Adult Authority. In their official capacities, said defendants are responsible for designing and implementing constitutional, lawful, and fair procedures to determine, *inter alia,* whether or not to fix an inmate's term and grant parole.

5. Defendant J. J. ENOMOTO is the Director of the Department and in such capacity is responsible



for the overall operation of the Department, the promulgation and enforcement of rules governing the confinement of inmates subject to the custody of the Department, including the proceedings held to determine disciplinary charges, and the keeping of the inmate central files relied on by the Adult Authority in making its term-fixing and parole release determinations.

6. Defendants are sued both individually and in their official capacities. In depriving plaintiffs and the members of their class of their constitutional rights, as set forth hereinafter, defendants and each of them have acted and refused to act under color of the statutes, ordinances, regulations, customs and usages of the State of California.

## FACTS

### 7. *Plaintiff Billy Ray Lewis*

A. In March of 1972, plaintiff BILLY RAY LEWIS was released on parole. His parole plan was based upon his working as a janitor in San Jose. Plaintiff commenced said employment, and approximately one month after his release married the woman to whom he had been engaged during his imprisonment. Shortly after their marriage plaintiff LEWIS and his wife experienced a series of marital difficulties. Plaintiff and his wife quarreled frequently and on more than one occasion his wife threatened to have his parole violated without cause and solely so plaintiff would be returned to prison. Eventually plaintiff moved out of their bedroom and

because of their growing incompatibility ceased having sexual relations with his wife.

B. On or about October 18, 1971, plaintiff's wife locked the door to their house, barred plaintiff's entry thereto, and demanded that he return later in the day to gather his belongings and that he move out. When plaintiff returned he was arrested by the Police and charged with the crime against nature based on a complaint allegedly made by plaintiff's wife to his parole officer falsely accusing plaintiff of having sexual relations with a dog.

C. Plaintiff's wife denied and now denies having lodged such a complaint. Plaintiff is unaware whether his wife's denial of having lodged the charge is true or whether she in fact lodged the complaint pursuant to her earlier threats to cause his parole to be revoked. In either case, said charges were and are complete fabrications and totally false, and plaintiff's wife so informed the Santa Clara Public Defender who was appointed to represent plaintiff in court. All criminal charges against plaintiff were accordingly dismissed.

D. At all times relevant hereto, plaintiff did everything in his power to preserve a difficult and deteriorating personal relationship with his wife under adverse conditions caused by his wife's quarrelsome nature, by her obesity, and by her constant threats to revoke his parole.

E. Notwithstanding the above, and notwithstanding the fact that plaintiff's wife informed the Adult



Authority that her alleged complaint was untrue, plaintiff was returned to prison and in December of that year appeared before the Adult Authority on parole violation charges which were based entirely upon the same charge which had been dismissed by the Court. At the hearing plaintiff was not permitted to rebut the charge against him, or to present any witnesses or other evidence to prove the falsity of the charges. Although plaintiff pled "not guilty" to the charge, the Adult Authority found him guilty, ordered that plaintiff undergo a psychiatric examination and obtain a "psych clearance" prior to his next parole hearing in May of 1972. Subsequently, plaintiff was duly examined and given a psychiatric clearance.

F. On or about April 26, 1972, plaintiff again appeared before the Adult Authority for parole consideration and sentence determination. On this occasion the Adult Authority refused to determine plaintiff's sentence or to release him on parole because of suspicion of sodomizing a dog and on a charge of "lewd behavior" and upon the further ground that he refused to admit that he was guilty. Again, plaintiff was denied the right to be represented by an attorney who was willing and able to appear in his behalf; and he was again denied the opportunity to present evidence or to rebut the false charges against him. At the hearing plaintiff was denied further parole consideration until November of 1972. Plaintiff was released on parole subsequent to the institution of this action.

8. *Plaintiff Danny Jones*

A. In February of 1970, an Adult Authority panel which included defendant LYNUM fixed two concurrent terms which plaintiff DANNY JONES was then serving, set a parole release date of October 1, 1970, and assigned plaintiff JONES to the department's Work Furlough program. Certain agents, representatives, and employees of defendant PROCUNIER, constituting members of the Classification Committee at the California Institution for Men at Chino (hereinafter "Chino") where plaintiff JONES was then confined, opposed the work furlough assignment, and arranged to prevent JONES from being so assigned. Plaintiff JONES saw no way to appeal the Department's frustration of the assignment ordered by the Adult Authority other than purposefully incurring a disciplinary report in order to appear again before defendant LYNUM. This plaintiff did, and when defendant LYNUM learned of plaintiff's situation, he reversed the action of the said Classification Committee and insisted that plaintiff be assigned to the Work Furlough program. Thereafter, two of the said Committee members told plaintiff explicitly that any possible excuse would be seized upon by them to bring about the rescission of plaintiff's parole date.

B. Plaintiff JONES subsequently obtained a job and then a promotion with Carson Industries, a trailer manufacturer. Certain of defendant PROCUNIER's agents, representatives and employees continued to plan actively to obtain rescission of plaintiff's parole date, and some made bets among themselves that he



would not be able to complete the program without having his parole date rescinded. Plaintiff JONES withstood the tensions and difficulties imposed by this continuing attitude, and made an excellent adjustment in the Work Furlough program and established a warm relationship with a woman his own age.

C. On or about September 26, 1970, only five days before plaintiff JONES was due to be released on parole, he returned to the prison quite tired from a hard day's work, and went to sleep at about 8:30 PM. Several hours later, about four guards, agents, representatives and employees of defendant PROCUNIER, went through plaintiff's wing and made their count on plaintiff's tier by loudly slamming the doors of the various cells. A few minutes later, the guards returned to plaintiff's cell and repeated the door banging routine, whereupon plaintiff, violently awakened from the beginnings of sleep, verbally protested this action to the guards involved. Although plaintiff's protest had been temperate and reasonable, the guards told him that they were going to lock him up for insubordination. Later, before the Watch Lieutenant, they altered their story to falsely charge plaintiff with threatening an officer. This Lieutenant listened to plaintiff's version of the incident and, noting that he had only five days to go before release on parole, told plaintiff to return to his cell and to continue his regular work schedule.

D. On or about September 29, 1970, upon returning to the institution from work, plaintiff was summarily placed in chains, taken to the Custody Ser-

geant's office, and later placed in isolation, although no reason was given for this treatment. About ten days later, several days after plaintiff was to have been released on parole, he was taken before a disciplinary committee composed of the same staff members who had opposed his participation in the Work Furlough program and charged with "threatening an officer" and "disobeying orders". About a week later, plaintiff appeared before two members of the Adult Authority for an interview which lasted less than two minutes. Three days later he received official notice that his parole date had been rescinded, and that he would be scheduled for an appearance before the Adult Authority in March of 1971, for further parole consideration. Petitioner was then transferred to Folsom Prison.

E. In March of 1971, petitioner appeared before the Adult Authority and received a new parole date of December 6, 1971. Although plaintiff opposed participation in the Work Furlough program, based upon his earlier experience, he was nonetheless transferred to said program, and to the same part of Chino where he had earlier had his difficulties with staff.

F. Upon entering the Work Furlough program, petitioner obtained employment with the same employer and once again, working and saving diligently, was able to establish credit, buy a car, and commence normal relationships with people on the outside world. However, about a month later plaintiff was summarily removed from the Work Furlough program pending "investigation", which apparently continued for the



next five days, whereupon plaintiff was told by staff that the investigation had "cleared" him and that he was being reinstated in the Work Furlough program. To this date plaintiff does not know what the reason for the "investigation" was. However, upon returning to his place of employment plaintiff's supervisor told him that he could not afford to hire people who would be arbitrarily suspended from the program for five days, as plaintiff had, and that he would therefore terminate plaintiff's employment and thereafter refrain from hiring any prisoners from the Work Furlough program. Approximately five days later plaintiff found part-time work cleaning up mobile homes.

G. Several months later, plaintiff was mistakenly arrested as a prowler, and was sentenced to serve 30 days in jail by a Municipal Court Judge in Corona for trespassing. On or about December 7, 1971, plaintiff was given a hearing before defendants KERR and EDMAN, who told him that if they released him he would simply stick guns in people's face and burglarize, apparently referring to the trespassing incident (in which the police report of this incident clearly stated that plaintiff was not armed). Shortly thereafter, plaintiff received notice that his parole date had been rescinded, his sentences redetermined, and his parole release date reset to June 5, 1972, conditioned upon plaintiff receiving no more disciplinary reports.

H. In February of 1972, a prison guard, an agent, representative and employee of defendant PROCUNIER, submitted a falsified disciplinary report con-

cerning plaintiff, accusing him of an insubordinate attitude. As a result, plaintiff's case was referred back to the Adult Authority, which again rescinded his parole date and transferred him to CMC.

I. At CMC plaintiff JONES appeared before the Adult Authority in May of 1972, for a hearing which lasted approximately 90 seconds. At this hearing the Adult Authority declined to determine plaintiff's sentence or to grant parole, and scheduled his next hearing for December of 1972. Plaintiff JONES remains in the custody of the Department as a prisoner, presently confined at CMC.

J. In none of the Adult Authority hearings referred to in this paragraph was plaintiff permitted to know the information upon which the panel members based their decision. During the last four such hearings the Adult Authority members had before them information which was in material part either false or misleading, yet plaintiff was not permitted to rebut this information by cross-examining the persons who had made the statements involved, nor was he permitted to present any evidence in his behalf. At none of the hearings was plaintiff permitted to be represented by counsel.

9. *Plaintiff Charles Edward Van Nort*

A. In May of 1967, plaintiff CHARLES EDWARD VAN NORT was sentenced to a term of imprisonment for violation of California Penal Code Section 245, which sentence was ordered to run concurrently with the unexpired time on a previous con-



viction. On or about May 20, 1970, plaintiff CHARLES VAN NORT appeared before the Adult Authority which fixed his terms and granted him a parole, to become effective on December 1, 1970. Shortly thereafter, plaintiff was assigned to the Work Furlough program at Chino, and began work at the Mayfair Market in Montclair, California.

B. On or about November 11, 1970, at approximately 5:45 AM, several officers from the Montclair Police Department, together with several members of the Chino and/or parole office staff, approached plaintiff and placed him under arrest. Plaintiff immediately requested to be informed of the charge against him, but the arresting officials refused to supply this information. Plaintiff then requested the assistance of counsel and also permission to make a telephone call, but both requests were denied. Plaintiff was summarily taken into custody and returned to Chino, where he was placed in segregation and held incommunicado.

C. Plaintiff remained in segregation for approximately a week, during which time he was interrogated by a Mr. Smith, who refused to inform him of the charges against him, refused to afford him the opportunity to consult with counsel, or even to make a telephone call. Officials at Chino would tell him only that his "case" had been "referred to the Los Angeles District Attorney", leaving plaintiff to believe that he was being charged with a felony. Accordingly, he remained silent except for the numerous demands which he made for information concerning the charges against him and the assistance of counsel.

D. On or about November 20, 1970, having recently been released to the general population of the Reception Guidance Center at Chino, plaintiff was brought before a disciplinary committee of that prison and ordered to enter a "plea" to the "charge", although officials still refused to disclose the nature of said charge. Over plaintiff's objection, the hearing officer entered a plea of guilty as charged and entered a recommendation to the Adult Authority that plaintiff's parole date of December 1, 1970, be rescinded. In addition, plaintiff was forced to sign a document which purported to set forth the nature of his "offense."

E. On or about December 22, 1970, plaintiff appeared before an Adult Authority panel at which time his parole date was officially rescinded. At no time during the hearing was plaintiff allowed to see the report against him or to present evidence in his favor; instead, he was told only that the "incident" was under investigation by the Los Angeles County District Attorney. On or about January 11, 1971, plaintiff received official notification of the Adult Authority's action, and on or about January 19, 1971, plaintiff received official notification that he had been designated a "Special Interest Case" by the Adult Authority. Plaintiff VAN NORT remains in the custody of the Department, presently confined at CMC.

F. Since that time plaintiff has upon many occasions requested officials of the Adult Authority and the Department to inform him of the "crime" which he had allegedly committed, but on every occasion this information was either flatly refused or else



plaintiff was told that the case was still being investigated by the Los Angeles County District Attorney. Subsequent to the rescinding of plaintiff's parole date, he has twice appeared before the Adult Authority. On each occasion he has been denied parole solely on the grounds of the alleged "crime" which was the cause for rescinding his parole date in December of 1970.

G. Plaintiff has never been presented with a statement of the evidence or charges against him by defendants and has never been shown police reports or parole agent reports of said evidence or charges by defendants. It was not until May, 1972, in a Return filed by the Attorney General of the State of California to a Petition for a Writ of Habeas Corpus filed in California State Courts by plaintiff, that plaintiff ever learned the nature of the charges against him. The information contained in said Return is false and inaccurate and in fact does not indicate that any "crime" was committed by defendant while at liberty or that any crime formed the basis for his parole rescission. Rather, said information indicates that plaintiff is accused of having been absent from work for a few hours on an occasion when he was ill, and during a period when there was no requirement that he report hourly to the Work Furlough Center, and further that a bottle of whiskey allegedly belonging to plaintiff—but in fact belonging to his father—was found in plaintiff's automobile.

H. In none of the Adult Authority hearings referred to in this paragraph was plaintiff permitted to

know the information upon which panel members based their decision. During all of the hearings commencing with the proceedings leading to rescission, the rescission itself, and the subsequent denials of parole, the Adult Authority members had before them information which was in material part either false or misleading, yet plaintiff was not permitted to rebut this information by cross-examining the persons who had made the statements involved, nor was he permitted to present any evidence in his behalf other than to make a statement. At none of the hearings was plaintiff permitted to be represented by counsel. As a result of the rescission of his parole, plaintiff has been classified in a special category and required by the Adult Authority to complete a special program entitled "Stress Assessment Unit" before even becoming eligible for favorable parole consideration. Correctional staff members at CMC, informed plaintiff VAN NORT in April of 1972 that he must dismiss all litigation concerning his parole rescission or be taken out of the said Stress Assessment Unit, without participation in which he cannot be eligible for parole consideration. Challenging any action taken by correctional or Adult Authority staff is regarded as evidence of lack of rehabilitation, and the Stress Assessment Unit specializes in probings of acceptance of guilt and wrongdoing. Plaintiff is informed and believes and therefore alleges, that his parole has been denied since it was rescinded, in whole or in substantial part, because he has sought to challenge the proceedings and to obtain judicial review of them.



10. *Plaintiff Robert Newton Gardner, Jr.*

A. In March of 1957, plaintiff ROBERT NEWTON GARDNER, JR. was released on parole, and his sentence, as fixed by the Adult Authority, was scheduled to expire on or about March 18, 1960. On or about December 11, 1959, a hearing of which plaintiff was unaware, was held by the Adult Authority, at which time plaintiff's parole was suspended. On or about May 30, 1960, some nine weeks subsequent to plaintiff's discharge date, his parole was revoked and he was returned to the custody of the Department.

B. On or about February 1, 1971, plaintiff was again released on parole. On or about March 17, 1971, plaintiff was arrested on charges of assault with a deadly weapon and possession of a firearm by an ex-felon. In September of 1971, plaintiff pled guilty to a violation of California Penal Code Section 245 (assault with force likely to produce great bodily injury), whereupon the trial judge reduced the offense to a misdemeanor and sentenced plaintiff to serve an amount of County Jail time equal to time which he had already served, for which credit was given, so that as of the date of sentencing plaintiff had no more time to serve on this charge. At the same time, the trial judge indicated that he believed the offense had arisen out of a family dispute.

C. Plaintiff's parole officer prepared a report concerning the foregoing incident. However, plaintiff is informed and believes and therefore alleges that said

parole officer refused to return the calls of approximately eight prospective witnesses who wished to give evidence on behalf of plaintiff, three of whom were attorneys who were knowledgeable about plaintiff's case. Said report was necessarily, therefore, incomplete, inadequate, and seriously distorted.

D. On or about November 19, 1971, the Adult Authority placed plaintiff in the STRU (Short Term Release Unit) Program, the effect of which is generally to make an inmate eligible for parole from four to six months thereafter. Subsequently, plaintiff appeared before an Adult Authority representative named Halderman, whom plaintiff had previously known when Halderman was serving at Folsom Prison, and with whom the plaintiff did not get along. When plaintiff attempted to explain the circumstances surrounding his misdemeanor conviction, Halderman refused to listen, but instead referred to plaintiff as a "trouble-maker" and recommended that plaintiff's parole be revoked and that he be removed from the STRU Program. On January 5, 1972, the Adult Authority, during an *ex parte* hearing, approved the recommendations of Halderman. Plaintiff was not permitted to be present at this meeting, nor was he allowed to be represented by any of the three attorneys who had requested to appear in his behalf. Plaintiff GARDNER was released on parole subsequent to the institution of this action.

E. Plaintiff is informed and believes and therefore alleges that a parolee is normally removed from the STRU Program only for cause, that is, for a violation



of the rules of the program. Plaintiff, however, had a good record in the STRU Program and was not removed therefrom for having violated any regulation of the Program; rather, plaintiff was removed from the Program without any good cause solely because the Adult Authority representative who presided over his case was personally biased and prejudiced against plaintiff.

F. All of the foregoing occurred without plaintiff ever being afforded the right to be heard and present a defense against the charges made, including the right to call witnesses in his own behalf, the right to confront and cross-examine the witnesses against him, the right to counsel, and the right to fair and timely notice of his alleged misconduct.

11. *Plaintiff John Van Geldern*

A. In October of 1967, plaintiff JOHN VAN GELDERN was released on parole. In February of 1969, after being convicted of violating California Penal Code Sections 2610a, and 487, and California Corporations Code Section 25542, plaintiff was returned to prison as a parole violator. In April of 1970, plaintiff appeared for the first time before the Adult Authority for purposes of a parole revocation hearing. Plaintiff was charged with violating 12 parole conditions, including charges of "moving without permission" and "being a corporation president without permission." At that time plaintiff refused to plead to the charges unless he was first permitted elemental

due process rights which would permit him to rebut any false charges in the record. This request was denied, and plaintiff was summarily found guilty of all charges, whereupon his parole revoked.

B. In February of 1972, plaintiff appeared before defendants EDMAN and BOWLER for a sentence determination and parole release hearing. During the hearing, one of the defendants stated that plaintiff was responsible for defrauding a number of persons connected with plaintiff's former business venture of approximately $250,000. Plaintiff replied that in the 19 volumes of transcripts from his trial, ample and overwhelming evidence is proved that statement totally, and that he had not been responsible for any losses whatsoever. However, plaintiff was not permitted to rebut defendants' totally false statement by other than his own statement, unsupported at the hearing by the evidence which he was not permitted to adduce. Plaintiff VAN GELDERN did not receive advance notice of these charges nor detailed specification of them. Plaintiff was not able to have the transcripts considered nor in any other way to furnish evidence rebutting these charges.

C. At the said February, 1972, hearing plaintiff was advised that his case would be submitted to an *en banc* proceeding before all eight members of the Adult Authority, assisted by defendant SPANGLER, at which plaintiff would not be present. In late May of 1972, the Adult Authority meeting *en banc* and in the absence of plaintiff, refused to determine his sentence or to grant parole. Plaintiff VAN GELDERN



was released on parole subsequent to the institution of this action.

D. Although plaintiff does not know the full contents of his central file, upon which sentence fixing and parole determinations are substantially based, he is informed and believes and therefore alleges that his central files contain false, inaccurate, misleading, distorted and prejudicial contents, and that these contents formed, in substantial part, the basis for the May, 1972, parole denial. Plaintiff has on many occasions requested to review his central file, specifically in March of 1970 and December of 1971, and prior to the filing of this case plaintiff's attorneys herein made formal request to review said file, in order to ascertain the exact contents thereof, and to correct the false and misleading information contained therein, but all such requests have been denied by defendants. Plaintiff VAN GELDERN also requested to be represented by counsel at the Adult Authority hearings determining revocation and reconsideration for sentence-fixing and parole, to present evidence in his behalf at said hearings, and to confront and examine those submitting charges and allegations against him at said hearings. All said requests have been denied by defendants.

12. *Plaintiff George Chatfield*

A. On or about June 13, 1968, plaintiff GEORGE CHATFIELD was placed on parole following a term in California State Prison for robbery. Shortly after his release, he suffered a complete nervous breakdown

in which he became the victim of a psychotic delusion that he was a bodyguard to President Kennedy; that President Kennedy had not been killed, but kidnapped; and that he had been instructed to rob a bank in order to obtain money for the President's ransom.

B. On or about February 27, 1969, he was apprehended by federal authorities for the robbery of a federally insured bank in Santa Rosa, California. He escaped from said custody and was again apprehended in Washington State on or about October 13, 1969, and returned to San Francisco. In San Francisco, pursuant to an order of the United States District Court for the Northern District of California, he was evaluated and examined to determine his competency to stand trial on the bank robbery charge. On or about February 12, 1970, the examining psychiatrist determined that plaintiff was mentally incompetent to stand trial or to understand the charges against him and that he suffered from a paranoid, schizophrenic reaction.

C. A further, more detailed examination was ordered by the Court, pursuant to which plaintiff was sent to California Medical Facility at Vacaville (hereinafter "CMF") for examination by CMF's chief psychiatrist, A. F. Nugent, M.D. On or about April 13, 1970, following extensive examination, Dr. Nugent concluded that plaintiff was a schizophrenic and that he was suffering an acute schizophrenic illness of psychotic proportions. Dr. Nugent further concluded that plaintiff was mentally incompetent to understand the proceedings against him or to assist in his own defense.



D. Plaintiff was then committed to the Medical Center for Prisoners at Springfield, Missouri, where he remained—except for a brief period when he was returned to San Francisco—until August, 1971. Psychiatric evaluations during this period by Springfield staff and by psychiatrists for plaintiff establish that plaintiff was schizophrenic and that he needed institutionalized psychiatric treatment and supervision for an indefinite period of time.

E. Because of the likelihood of an insanity defense prevailing at any trial on the federal bank robbery charges, the United States Attorney elected to dismiss the federal charges in August, 1971. Plaintiff was thereupon returned to California State Prison to face parole violation charges which included a charge that he committed the same bank robbery which had just been dismissed in Federal Court. Plaintiff was at this time still schizophrenic and paranoid and incapable of assisting in any defense, or of arguing to the Adult Authority that he should be committed to a mental institution.

F. Plaintiff first appeared before two members of the Adult Authority at a parole revocation hearing in December, 1971. At said time he requested the right to have an attorney. Said request was denied. He was then asked to plead guilty or not guilty to the parole violation charges against him. Plaintiff then stated that he could not enter a plea without some assistance and that he did not know what the charges were about

nor did he understand them. The panel refused all requests for assistance, adjourned the revocation hearing, and summoned plaintiff to a new hearing in January, 1972. At the January, 1972, hearing, two Adult Authority members badgered and pressured plaintiff for over an hour to plead either guilty or not guilty to the charges against him and refused again to permit him to be represented by counsel. Plaintiff again declined to enter either plea without legal assistance, and left the revocation hearing. In his absence, the panel found plaintiff guilty of having violated conditions of his parole, revoked said parole, refixed his sentence at the maximum of life, and returned him to State Prison to finish his term. Plaintiff has been in San Quentin Prison ever since.

G. At each of the foregoing hearings before the Adult Authority, the panel members acted without affording plaintiff any opportunity to make a coherent presentation of his case since he was incompetent and insane. The Authority therefore did not have a full, complete, or accurate picture of the facts of his case, nor did it have before it any analysis of what possible dispositions short of a new state prison commitment were available in plaintiff's case.

13. Under the law of the State of California, a trial judge may not set the term of imprisonment for one convicted of a felony; rather, any such person who is sent to prison must be sentenced to the term prescribed by California's indeterminate sentence law which provides, in most case, for both a minimum and a maximum term of imprisonment. The actual prison



term to be served by the prisoner, as well as the amount of time to be served on parole, is determined by the California Adult Authority, which consists of nine members appointed by the Governor, assisted by hearing representatives appointed by the Chairman of the Adult Authority. Determinations with respect to term-fixing and parole release are made by members and hearing representatives, who typically sit in panels consisting of two members and/or representatives. Adult Authority procedures change frequently with changes in administrations, shifts in political winds, and alterations in penological fads. Typically however, if an inmate's term is not fixed, he is scheduled for another hearing a year later. The Adult Authority's term-fixing, parole release hearings average about 15 minutes in length, and are followed by deliberations of the panel members which usually last less than two minutes in length. The only written material generally considered by the panel members is that contained in the inmate's central file, which one panel member often reads while the other panel member is carrying the interview of the preceding inmate. If the Adult Authority refuses to fix the inmate's term, he is given a written statement of reasons for the denial.

14. Effective March 1, 1975, a number of experimental changes were instituted by defendant PROCUNIER, who had recently been appointed as Chairman of the California Adult Authority (these changes are sometimes hereinafter collectively referred to as the "Procunier System"). Changes in the

Adult Authority's policies and procedures instituted under the Procunier System include the following:

A. The Adult Authority fixes the term and sets a parole release date for most, but not all, of the inmates who appear before it. This parole release date, in the discretion of the Adult Authority, may later be taken away or altered for a variety of reasons;

B. In fixing time, the Adult Authority utilizes so-called "base ranges" which are minimum and maximum periods of time established for most felonies by the Adult Authority. These have no particular logical bases, but are simply based upon the median prison sentences served by prisoners in California during the past five years. Moreover, the Adult Authority panels are free, in their sole discretion, to fix terms outside these ranges, and in fact they often do so;

C. In addition to fixing terms in accordance with the base ranges, additional time is ordinarily added to a prison sentence for any and all of the following, to wit:

(i) other sentences, whether ordered by the sentencing judge to run concurrently or consecutively with the "base range" sentence;

(ii) prior convictions;

(iii) prior prison terms;

(iv) subsequent offenses; and

(v) in-prison disciplinary offenses;

D. Whenever an inmate's term is fixed and a parole date is given, no reasons are furnished to the inmate, regardless of how long the term may be or



how far in the future the parole release date may be; and

E. An "appeals" system is provided (utilizing Adult Authority members and hearing representatives) whereby an inmate may challenge, for a very limited number of reasons, the action of the Adult Authority.

15. Hearings are also conducted by the Department of Correction, which purport to adjudicate infractions of prison rules. Consequent to such adjudications prisoners may be punished by transfer, assignment to solitary confinement, permanent reclassification to maximum security sections, and other loss of the restricted liberty which is available to the general prison population. Reports concerning these alleged infractions are placed in the files of plaintiffs and the members of their class, are available to the Adult Authority, and are often used to deny or rescind parole.

16. The hearing procedures employed by the Adult Authority and by the Department of Corrections are constitutionally infirm because they are not designed to be, nor are they effective in exposing and developing the critical facts upon which the Department's and the Adult Authority's decisions must be made, or in applying to such facts criteria appropriate to reaching a rational and correct decision as a matter of law. Constitutional defects in these procedures (as they existed prior to March 1, 1975, and as they presently exist pursuant to the Procunier System) include, *inter alia*, the following:

A. Defendant Adult Authority members, hearing representatives, and administrative officers have no expertise in arriving at fair decisions concerning term-fixing or parole release. To the contrary, said members, representatives, and administrative officers are quite unsuited for the task as a result of:

(i) The narrow partisan background which virtually every one of them possesses, due to having been for many years a law enforcement officer or an employee of the California Correctional System, and the punitive anti-prisoner biases which they possess;

(ii) Their experience as Adult Authority members, representatives or administrative officers, which has led them to adopt rigid and stereotyped thinking patterns pursuant to which they look more for the quality of servility than for those qualities which would, in fact, portend success on parole; and

(iii) Their totally inadequate knowledge, experience, or education in the use, meaning or limitations of psychological or psychiatric terms, diagnoses, prognoses, or tests, even though psychiatric reports and concepts are heavily relied upon by defendants in arriving at term-fixing and parole release decisions.

B. The persons who serve as members and representatives of the Adult Authority do not reflect a wide or representative cross-section of the population of California, but instead manifest attitudes which militate against a fair and open attitude in assessing parole readiness.



C. At the hearings, panel members rely heavily upon written material which is unreliable, because composed of reports which:

(i) Are often false, malicious, inaccurate or misleading;

(ii) Are essentially one-sided, insofar as they contain almost exclusively adverse material, without a corresponding emphasis upon the positive aspects of an inmate's prison behavior;

(iii) Are placed in an inmate's file through a process which contains no substantial safeguards whatsoever to determine reliability; and

(iv) May not be reviewed in their entirety by the inmate, who is therefore unable to refute even the most demonstrably untrue information.

D. Psychiatric evaluations are prepared by prison staff members and submitted to the Adult Authority for many prisoners. Although these reports are extremely unreliable, because they:

(i) Are prepared by inadequately trained personnel;

(ii) Are prepared in an inadequate amount of time;

(iii) Pretend to make predictions which cannot in fact validly be made; and

(iv) Are often misunderstood by the Adult Authority members or representatives, who are untrained in psychology or psychiatry;

the Adult Authority places heavy reliance thereon, often either refusing to fix an inmate's term or fixing

a longer term than would otherwise be imposed based upon the so-called psychiatric evaluation.

E. Hearings held by the Department of Corrections (1) to adjudicate alleged rules infractions and to impose disciplinary sanctions (including prolonged isolation and loss of privileges) or (2) to write and lodge reports of infractions and other incidents in the permanent central files of inmates are conducted arbitrarily and capriciously. Investigation of the facts of such alleged infractions is biased and incomplete and inmates are not given an opportunity to rebut or, in many cases, even to see the evidence against them. When formal hearings are held at all, they are conducted by partial and interested personnel. Neither the inmate nor any representative of the inmate is authorized to see his entire central file even though items in said file are frequently used as evidence against him. These procedures are not designed to and in fact do not develop the critical facts on which administrative decisions are made and reports are made; and many inmates are denied parole by the panel based upon such reports which are, in fact, false or misleading.

F. In appearing before an Adult Authority Panel, most inmates are so fearful, tongue-tied, or lacking in the ability to organize and articulate their position that they are unable to make an effective presentation of their case, or even on occasion to respond accurately to questions posed by the panel. Many such inmates are unable to make an effective presentation of their case because of a low Intelligence Quotient



("I.Q.") level, a lack of education, language difficulties, psychiatric disorders, or the adverse effects of the heavy medication to which they are subject at the time of the hearing. All prisoners are severely handicapped in making an objective or effective presentation by reason of their intense involvement in their own case and their confinement in the limited, artificial and authoritarian setting of a prison environment. Usually, the inmate has no idea what the two panel members are concerned about. Sometimes the panel explicitly informs the inmate of their particular concerns, and sometimes it does not. The impression which the panel members receive concerning the inmate is often quite different from the truth.

G. In every hearing the panel members do not have or do not take sufficient time:

(i) To thoroughly review the relevant written material before them;

(ii) To conduct a thorough and meaningful interview with the inmate; or

(iii) To arrive at an informed decision pursuant to an adequate discussion of the case.

H. Inmates are often told, at a term-fixing hearing, that particular accomplishments (e.g., participation in vocational training or group counseling) are expected of them prior to their next appearance before the Adult Authority, if they are to have their sentence fixed and parole granted. Often, however, the inmate will accomplish the very matters prescribed, only to be told by two different members of

representatives at his next hearing that those accomplishments are irrelevant and that some one or more items must be performed during the subsequent year. Such inconsistency from year to year, and between different members and representatives of the Adult Authority, causes frustration, bitterness and hostility in many inmates, and is therefore anti-rehabilitative in nature.

I. The term-fixing and parole determinations made by the Adult Authority are made in the absence of any officially adopted or consistently applied criteria.

J. The term-fixing and parole decisions reached by the Adult Authority, depend, in large part, upon certain basic assumptions which are false and without basis in fact. Such assumptions include, *inter alia*, the notion:

(i) That a parole board is able to predict future dangerousness or the likelihood of recidivism among the inmates whose terms it fixes;

(ii) That so-called treatment programs administered in the prisons are meaningful, and that participation in them by prisoners is likely to increase the chances of their success on parole; and

(iii) That psychologists and other prison staff members are able to do and conduct meaningful psychiatric evaluations of prisoners, and transmit such information to the Adult Authority in reports which it correctly interprets and may justifiably rely upon in reaching its term-fixing and parole decisions.



K. Because of the considerations set forth in this paragraph, the decisions reached and the actions taken by Adult Authority members and representatives herein complained of are decided in an arbitrary and capricious manner and are based upon:

(1) Mere whim and caprice, reflecting primarily the panel member's personal predictions, and uninformed hunches and guesses;

(2) Discriminatory considerations, reflecting primarily the panel member's own political, racial, and other biases and/or;

(3) Criteria which in fact do not correspond to the likelihood of success on parole, and therefore are not based upon the "good cause" required by State law and the Federal Constitution.

17. State prisoners perceive Adult Authority and Department of Corrections hearings to be eminently unfair, and they share a widespread belief, based on fact, that the Adult Authority and the Department consistently act in an arbitrary, discriminatory, and illegal manner; that their central files, upon which the Adult Authority places heavy reliance, contain much untrue and misleading information; and that the indeterminate sentence implemented through the type of hearing presently conducted by the Adult Authority, is fundamentally unfair. In fact, the type of Adult Authority and Department of Corrections hearings described herein cause grave and extensive anxiety and suffering.

18. The intended benefits of the indeterminate sentence have, in fact, been utterly perverted by the

defective hearings conducted by the Adult Authority, as described herein. The result is that California presently exacts the longest sentences in the nation, and is holding in confinement literally thousands of inmates who should not be imprisoned by any rational criteria, thereby inflicting needless massive human suffering.

19. As a result of the defective procedures and excessive imprisonment complained of herein, millions of dollars exacted from the taxpayers of the State of California are annually being spent in an unlawful and unconstitutional manner in order to finance the Adult Authority and its supporting bureaucracy and to maintain, in prison, persons who would not otherwise be incarcerated.

20. The appeals system adopted by the Adult Authority is grossly inadequate and fails to cure the defects complained of herein, inasmuch as it does not result in an effective review of most term-fixing or parole release determination, and is in fact maintained largely to dissuade courts and the legislature from abolishing or modifying the procedures followed by the Adult Authority.

21. The procedures presently in effect pursuant to the Procunier System have been modified since their initial adoption and may in the future be instantly modified by the Adult Authority for any reason or for no reason at all. Moreover, many individual features of the Procunier System are unlawful (such as the treatment under that system of concurrent sentences) and will require drastic future changes in the system.



## LEGAL CLAIMS

22. While acting under color of the law of the State of California, as more fully described in Paragraphs 13 through 21 hereof, defendants have deprived plaintiffs and the members of their class of the following rights which are secured to them by the United States Constitution and by the Constitution and Statutes of the State of California:

A. The right not to have a decision by the Adult Authority, which fixes a prisoner's term and/or sets a date for his release on parole, made upon an arbitrary, capricious or discriminatory basis, in the absence of valid and consistently applied criteria established in advance of judgment, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and Article I, Section 13 of the California Constitution.

B. The right not to have term-fixing and parole release decisions made upon criteria and assumptions which are false and without basis in fact, as more fully set forth in Paragraph 16 hereof, in violation of Due Process clause of the Fourteenth Amendment and Article I, Section 13 of the California Constitution.

C. The right not to have term-fixing and parole release decisions made in the absence of counsel and other fundamental procedural safeguards, including, *inter alia:*

(i) Timely notice of all proceedings and hearings, timely and informative notice of all charges including a statement of the charge and of the

evidence to be relied upon, and an opportunity to conduct a timely review of the entire central file:

(ii) An opportunity to be heard, to subpoena and present witnesses, to present documentary evidence and to confront and cross-examine witnesses;

(iii) The right to be represented by counsel at any hearing;

(iv) The right to be heard by an unbiased panel or official and the right to challenge any panel or official for cause;

(v) The right to receive a verbatim transcript of any hearing and a statement written by the panel members of the evidence relied upon and of the reasons for:

(a) refusing to fix a prisoner's term or grant him a release on parole; or

(b) setting a parole release date which is more than six months subsequent to the date of the hearing; and

(vi) The right to challenge any member of a disciplinary committee or any Adult Authority panel member for bias or other valid cause,

in violation of the Due Process Clause of the Fourteenth Amendment, and Article I, Sections 8, 11, 13, and 21 of the California Constitution.

D. The right to be free from prolonged incarceration for periods of time and for reasons which shock



the general conscience and are intolerable to fundamental fairness, which constitute punishment greatly disproportionate to any offense for which they are imposed and which go beyond what is necessary to accomplish any legitimate penal aim, in violation of the Eighth Amendment and Article I, Section 6 of the California Constitution.

E. The right not to serve an excessive amount of time in prison because of other sentences (whether concurrent or consecutive) which have been imposed, in-prison disciplinary offenses, prior convictions, prior or subsequent prison terms, or pre-jail time for which insufficient credit has been given, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Constitution and Statutes of the State of California.

F. The right not to have disciplinary sanctions imposed for the alleged violation of prison rules, or reports of said violations placed in inmate central files, in the absence of a fair and impartial investigation of the facts, a hearing before an impartial tribunal and a right to counsel whenever serious disciplinary sanctions are considered, the right to call and cross-examine witnesses, and the right to view and examine the inmate's entire central file, all of which rights are secured by the Fourteenth Amendment to the United States Constitution and Article I, Sections 8 and 13 of the California Constitution.

23. An actual controversy has arisen and now exists relating to the rights and duties of the parties, in that defendants have denied and continue to deny

to plaintiffs and their class the constitutional and statutory rights set forth in Paragraph 22 hereof. As a result of these violations, plaintiffs and the members of their class have been and will continue to be irreparably injured by the aforesaid conduct of defendants unless this Court grants the declaratory relief which they seek. Plaintiffs have no plain, adequate, or complete remedy at law to redress the unlawful acts complained of herein.

WHEREFORE, plaintiffs and the members of their class request that this Court:

1. Issue a declaratory judgment that the Indeterminate Sentence Law, as presently administered by the California Adult Authority, is unconstitutional as violative of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 7, 14, 15, 17 and Article IV, Section 16, of the California Constitution;

2. Issue a declaratory judgment that the acts of defendants enumerated in Paragraphs 7 through 21 hereof violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 7, 14, 15, 17 and Article IV, Section 16, of the California Constitution;

3. Issue an order that plaintiffs' attorneys are entitled to the payment by defendants of costs and reasonable attorneys' and witnesses' fees;

4. Certify that this action may be maintained as a class action under Rule 23, Federal Rules of Civil Procedure; and



5. Grant such other and further relief as to the Court seems appropriate, including retaining jurisdiction in this matter.

Dated: February 17, 1976

Respectfully submitted,
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[Proof of Service Omitted in Printing]